SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1949

No. 490

THE UNITED STATES OF AMERICA
APPELLANT

VS.

COTTON VALLEY OPERATORS COMMITTEE, *et al.*

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF LOUISIANA

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37 In the District Court of the United States
For the Western District of Louisiana

Shreveport Division

(File Endorsement Omitted)

Civil Action No. 2209

UNITED STATES OF AMERICA, PLAINTIFF

v.

COTTON VALLEY OPERATORS COMMITTEE, *et al.*, DEFENDANTS

Complaint—Filed June 17, 1947

The United States of America, plaintiff, by its attorneys, acting under the direction of the Attorney General, brings this civil action against the defendants named herein and upon information and belief alleges as follows:

I

JURISDICTION AND VENUE

1. This complaint is filed and these proceedings are instituted under Section 4 of the Act of Congress of July 2, 1890, c. 647, 26 Stat. 209, as amended, entitled "An Act to Protect Trade and Commerce against Unlawful Restraints and Monopolies," said Act being commonly known as the "Sherman Act," against the defendants herein named to prevent and restrain continued violations by them of Sections 1 and 2 of said Act.

2. The unlawful acts and violations hereinafter alleged have been conceived and have been carried out and made effective in the Shreveport Division of the Western District of Louisiana, where the defendants transact business and where all of the defendants may be found.

38 II

DEFENDANTS

3. COTTON VALLEY OPERATORS' COMMITTEE is a voluntary unincorporated association of owners of the right to search for and produce oil, gas or other hydrocarbons within the Cotton Valley Field, Webster Parish, Louisiana. Said committee was formed pursuant to the terms of the Cotton Valley Unitization and Pressure Maintenance Agreement entered into between said owners during the spring of 1940. Said committee maintains offices and transacts business in

Cotton Valley, Louisiana and frequently holds its meetings in Commercial National Bank Building, Shreveport, Louisiana. Cotton Valley Operators' Committee is hereby made a defendant herein and is hereinafter referred to as "Operators' Committee."

4. The following corporations are hereby made defendants herein:

Name of Corporation	*State of Incorporation*	*Location of Principal place of Business*
The Ohio Oil Company	Ohio	Findlay, Ohio
Hunt Oil Company	Delaware	Dallas, Texas
Magnolia Petroleum Company	Texas	Dallas, Texas
Union Producing Company	Delaware	Shreveport, La.
Fohs Oil Company	Delaware	Houston, Texas
Bodcaw Cotton Valley Company, Inc.	Louisiana	Texarkana, Arkansas
Grant Oil Company	Louisiana	Shreveport, La.
Midstates Oil Corporation	Delaware	Tulsa, Oklahoma
North American Oil Consolidated	California	San Francisco, Cal.
Root Petroleum Company	Delaware	Shreveport, La.
Woodley Petroleum Corp.	Delaware	Houston, Texas
Jabco, Inc.	Unknown	Shreveport, La.
Stanolind Oil & Gas Company	Delaware	Tulsa, Oklahoma
39 Sunray Oil Corporation	Delaware	New York, N. Y.
Welori Lumber Corporation	Louisiana	Cotton Valley, La.

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5. The following individuals are hereby made defendants herein:

Name	*Address*
H. L. Hunt	1608 Santa Fe Building, Dallas, Texas
H. L. Hunt, Trustee for Hassie Hunt	1608 Santa Fe Building, Dallas, Texas
A. G. Oliphant	National Bank of Tulsa Building, Tulsa, Oklahoma
Allene Oliphant	National Bank of Tulsa Building, Tulsa, Oklahoma
Charles W. Oliphant	National Bank of Tulsa Building, Tulsa, Oklahoma
A. J. Hodges	Ardis Building, Shreveport, Louisiana
M. H. Marr	Gulf States Bldg., Dallas, Texas
Sydney G. Myers	723 Giddens Lane Building, Shreveport, Louisiana
Mrs. Nellie G. Myers	723 Giddens Lane Building, Shreveport, Louisiana
H. W. Perritt	Caddo Hotel, Shreveport, Louisiana
W. G. Ray	Shreveport, Louisiana
Daniel W. Stewart	Minden, Louisiana
E. L. Stewart	Minden, Louisiana
Frank B. Treat	Minden, Louisiana
G. H. Vaughn	Dallas National Bank Building, Dallas, Texas
E. V. Whitewell	Commercial National Bank, Shreveport, Louisiana
W. C. Woolf	Shreveport, Louisiana
W. A. Delaney, Jr.	Ada, Oklahoma

6. All of the above-named corporate and individual defendants are owners of rights to search for and produce liquid and gaseous hydrocarbons in the Field, are parties to the Cotton Valley Utilization and Pressure Maintenance Agreement, hereinafter described, and are members of the Operators' Committee.

III

Background

7. The Cotton Valley Oil Field is located in Webster Parish in the State of Louisiana. Whenever the term "Field" is hereinafter used, it is intended to mean the said Cotton Valley Oil Field including the natural underground reservoirs in said Field in which hydrocarbons are present.

8. The Field contains hydrocarbons in both liquid and gaseous forms. These hydrocarbons are under high pressure within the reservoirs, and in the exploitation of the Field this pressure is utilized to bring both the liquid and the gaseous hydrocarbons to the surface of the ground. This flow of liquid and gaseous hydrocarbons as it reached the surface is sometimes hereinafter referred to as the "natural flow" from the Field. The greater part of the hydrocarbons in the Field are found at depths in excess of 8,000 feet. The ratio of gaseous to liquid hydrocarbons in the Field is in excess of 10,000 cubic feet of gas to one barrel of liquid. The cost of producing liquid hydrocarbons from individual wells is high. Rights to produce hydrocarbons from the Field are owned by more than thirty individuals and corporations. The production of gaseous and liquid hydrocarbons from the Field without reinjecting a part thereof into the Field would result in the rapid reduction of the underground gas pressure necessary to the ultimate recovery of both liquid and gaseous hydrocarbons from the Field. It is economically impracticable for individual owners to reinject a part of the gaseous and liquid hydrocarbons into the Field.

41 9. In an effort to find a solution to these problems the producers in the Field erected an experimental injection station in 1939. From this experiment it was determined that certain of the liquid and gaseous hydrocarbons could be separated from the natural flow from the reservoirs and the residue could be returned to the reservoirs under pressure, permitting the exploitation of the Field without serious reduction of the pressure within the natural reservoirs. To accomplish this objective the producers of over half of all gaseous and liquid hydrocarbons from the Field entered into an agreement in the spring of 1940 which is known as the Cotton Valley Unitization and Pressure Maintenance Agreement, hereinafter referred to as "the Agreement". Thereafter other producers of hydrocarbons from the Field joined and became parties to the Agreement, and

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at the time of the filing of this complaint the parties thereto produced in excess of 90% of all hydrocarbons taken from the Field. All of the defendants herein are parties to the Agreement or participated in activities related thereto. The purpose of the Agreement as set out in the preamble thereof is that "of more properly conserving the resources of said common oil, gas and other hydrocarbon field, pool or reservoir, and for the prevention of underground and surface waste." The Agreement provides for the unitization of liquid and gaseous hydrocarbons within a substantial part of the underground reservoirs of the Field and the pooling of lands containing these substances, for the production of these substances by a joint agency to be known as the Operators' Committee, and the apportionment of the substances so produced to the owners of individual rights in the area covered by the Agreement on an agreed upon basis. The Operators' Committee is authorized by the Agreement to exercise the sole right to drill in the area covered by the Agreement with certain limited exceptions, to enter into contracts for the extension of that area and to plan, co-ordinate and execute the development and operations
42 within that area for unitized substances. As a part of this development the Operators' Committee is specifically authorized to construct and maintain a modern recycling, pressure maintenance and liquid hydrocarbon extraction and processing plant. The Agreement stipulates that all unitized substances produced from the area covered by the Agreement, except such as may be used for production or development purposes or for repressuring or recycling, shall be apportioned among the owners and allocated on an acreage basis to the several tracts of land comprising such area except that the Operators' Committee shall be empowered to dispose of the gas produced for all owners.

10. Pursuant to power delegated by Act Number 225 of the Legislature of the State of Louisiana of 1936, and by Act Number 157 of the Legislature of the State of Louisiana of 1940, the Commissioner of Conservation of the State of Louisiana issued Order Number 10-B, dated July 1, 1940, and Order Number 10-C, dated January 28, 1941, approving the Agreement only insofar as it provided for the unit operation and development of the area covered by the Agreement and the reinjection into the reservoir under pressure of a part of the liquid and gaseous hydrocarbons produced from said Field.

IV

Trade and Commerce Involved

11. During the period of the combination and conspiracy hereinafter alleged, in excess of 30 million barrels of liquid hydrocarbons and in excess of 150 billion cubic feet of gaseous hydrocarbons have been taken from the Field and not reinjected therein. Substantially all of said hydrocarbons have moved in a continuous uninterrupted flow from the producing wells in Louisiana to consumers in States other than Louisiana. A substantial part of said hydrocarbons have been shipped directly to consumers in States other than Louisiana without processing. A substantial part of said hydrocarbons have been processed in facilities
43 located in the State of Louisiana and the various products resulting therefrom have thereafter been shipped in interstate commerce to consumers in States other than Louisiana. A substantial part of said hydrocarbons have been shipped in interstate commerce to facilities located in States other than Louisiana and there processed; and after processing in such States the various products resulting therefrom have been shipped in interstate commerce to consumers in States other than the States in which said hydrocarbons were processed. Said hydrocarbons have included crude oil, distillate, butanes, pentanes, toluene concentrate, gasoline, fuel oil, kerosene, residuum, and illuminating and heating gas. Said hydorcarbons have been moved in interstate commerce by means of pipelines, railroad tank cars, trucks and trailers, barges and tank wagons. The processing of said hydrocarbons in refineries, cracking plants, and other facilities, and the transfer of said hydrocarbons from one means of conveyance to another facilitates and implements the interstate movement of said hydrocarbons and does not interrupt the interstate flow of said hydrocarbons from the producing wells in Louisiana to the consumers in States other than Louisiana.

V

Offenses Charged

12. Beginning in or about April, 1940, and continuing to and including the date of the filing of this complaint, the defendants well knowing the facts herein alleged, have combined and conspired to restrain unreasonably and to monopolize interstate trade and commerce in the liquid and gaseous hydrocarbons taken from the Field and not reinjected therein, and in the various products made therefrom,

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in violation of Section 1 and Section 2 of the Act of Congress of July 2, 1890, entitled "An Act to Protect Trade and Commerce Against Unlawful Restraints and Monopolies," as amended (15 U. S. C. 1 and 2) commonly
44 known as the "Sherman Act". Defendants threaten to, and will, continue said offenses unless the relief hereinafter prayed for is granted.

13. Said combination and conspiracy has consisted of a continuing agreement and concert of action among the defendants the substantial terms of which have been and are the defendants:

(a) Agree to jointly engage in and exclude others from the business of extracting, processing and refining various separate hydrocarbons and hydrocarbon products from over 85% of the natural flow of liquid and gaseous hydrocarbons produced from said Field and not reinjected therein, which said business of extracting, processing and refining was in addition to that required to separate said hydrocarbons from said natural flow or to reinject the residue thereof into the Field;

(b) Agree to jointly engage in and exclude others from the business of distributing and selling all of the hydrocarbons and hydrocarbon products jointly extracted, processed or refined by the defendants from over 85% of the natural flow of liquid and gaseous hydrocarbons produced from the Field and not reinjected therein.

(c) Agree to jointly sell through channels of distribution jointly selected by the defendants all of the hydrocarbons and hydrocarbon products extracted, processed or refined by the defendants from over 85% of the natural flow of liquid and gaseous hydrocarbons produced from the Field and not reinjected therein.

(d) Agree upon fixed and uniform prices and terms and conditions of sale for each of the hydrocarbons and hydrocarbon products extracted, processed or refined by the defendants from over 85% of the natural flow of liquid and gaseous hydrocarbons produced from the Field and not reinjected therein, and agree to sell each of said hydrocarbons and hydrocarbon products at the said fixed and uniform prices and upon said terms and conditions of sale.

45 14. The continuing agreements, understandings and concerted action of the defendants set out in paragraphs 11 and 12 of this complaint do not contribute to the conservation of the oil and gas resources of the Field or of

the State of Louisiana, or prevent the waste and depletion thereof. Said agreements, understandings and concerted action are not necessary, and do not contribute, to the separation of any of the liquid and gaseous hydrocarbons from the natural flow of liquid and gaseous hydrocarbons taken from the Field, nor to the reinjection of a residue of liquid and gaseous hydrocarbons under pressure into the natural reservoirs of the Field. Said agreements, understandings and concerted action are not authorized by Act Number 225 of the Legislature of the State of Louisiana of 1936, Act Number 157 of the Legislature of the State of Louisiana of 1940, nor by Order Number 10-B, dated July 1, 1940, Order Number 10-C, dated January 28, 1941, nor any other order issued by the Commissioner of Conservation of the State of Louisiana.

15. During the period of the combination and conspiracy herein alleged, the defendants, for the purpose of forming and effectuating the aforesaid combination and conspiracy to restrain unreasonably and to monopolize interstate trade and commerce in liquid and gaseous hydrocarbons taken from the Field and not reinjected therein, have done the things which as hereinbefore alleged they combined and conspired to do.

EFFECTS

16. The aforesaid combination and conspiracy and the acts and things done by defendants in forming and effectuating said combination and conspiracy, were intended by the defendants to and have had the following effects:

(a) Excluded other persons and companies from the business of extracting, processing and refining various separate hydrocarbons and hydrocarbon products from over 85% of the natural flow of liquid and gaseous hydrocarbons produced from the Field and not reinjected therein;

46

(b) Excluded persons and companies other than the defendants and those jointly selected by the defendants from an opportunity to engage in the business of selling and distributing liquid and gaseous hydrocarbons jointly produced by the defendants from said Field and the hydrocarbon products jointly processed, extracted or refined by the defendants therefrom;

(c) Excluded persons and companies other than the defendants and those jointly selected by the defendants from an opportunity to engage in the business of

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transporting liquid and gaseous hydrocarbons jointly produced by the defendants from said Field and the hydrocarbon products jointly processed, extracted or refined by the defendants therefrom; and

(d) Eliminated competition among the defendants, and between the defendants and others, in the extraction, processing and refining, in the transportation, in the distribution, and in the sale of hydrocarbon products extracted from over 85% of the natural flow of liquid and gaseous hydrocarbons produced from the Field and not reinjected therein.

47 PRAYER

WHEREFORE, Plaintiff prays that the Court adjudge and decree:

1. That pursuant to Section 5 of the Sherman Act writs of subpoena issue, directed to the defendants named herein, demanding that they appear herein and answer the allegations contained in this complaint and thereafter abide by and perform such orders and decrees as the court may make and enter.

2. That the aforesaid combination and conspiracy in restraint of and to monopolize interstate trade and commerce in the liquid and gaseous hydrocarbons taken from the Cotton Valley Field not reinjected therein, is unlawful, and that the said combination and conspiracy and the acts and things done pursuant thereto as aforesaid are in violation of Sections 1 and 2 of the Act of Congress of July 2, 1890, entitled "An Act to Protect Trade and Commerce Against Unlawful Restraints and Monopolies," as amended, commonly known as the Sherman Act.

3. That the defendants have entered into and are now engaged in the combination and conspiracy herein alleged and have performed and done, and are now performing and doing, the herein alleged acts and things pursuant to and in furtherance of the conspiracy, and have thereby unlawfully restrained and monopolized interstate trade and commerce in violation of Sections 1 and 2 of the Sherman Act.

4. That the defendants herein and their successors, officers, agents, employees, and all persons acting or claiming to act on behalf of said defendants and their successors, be perpetually enjoined and restrained from in any way conspiring, contracting or otherwise acting in concert with one another or with other persons or groups of persons for the

purpose or with the effect of continuing said combination and conspiracy, or of entering into or effectuating any similar combination or conspiracy.

48 5. That the defendants herein and their successors, officers, agents, employees and all persons acting or claiming to act on behalf of said defendants or their successors be required to cancel and abrogate all existing arrangements, understandings, agreements and contracts, entered into pursuant to or in furtherance of said conspiracy, for the sale of hydrocarbons and hydrocarbon products extracted, processed or refined by the defendants from the natural flow of liquid and gaseous hydrocarbons taken from the field; and that they and each of them be perpetually enjoined and restrained from agreeing among themselves as to the price, terms, or conditions at which any part of said hydrocarbons and hydrocarbon products shall be or should be sold, or agreeing to sell or selling any part of said hydrocarbons or hydrocarbon products through or to any common, joint or exclusive sales agent, broker, refiner, pipeline company or other sales or distribution medium.

6. That the defendants herein and their successors, officers, agents, employees and all persons acting or claiming to act for or on behalf of said defendants or their successors be perpetually enjoined and restrained from engaging jointly in the extraction, processing or refining of hydrocarbons or hydrocarbon products from the natural flow of liquid and gaseous hydrocarbons taken from the Field, except in so far as such extraction, processing or refining are essential to the separation of liquid and gaseous hydrocarbons from the natural flow of liquid and gaseous hydrocarbons from the Field and the reinjection of the residue thereof into the Field for the purpose of achieving ultimate recovery therefrom.

7. That the plaintiff recover the costs of this suit.

49 8. That plaintiff have such other further and more general relief as may be necessary in the premises.

W. B. Watson Snyder
W. B. Watson Snyder
Special Assistant to the Attorney General

Tom C. Clark
Tom C. Clark
Attorney General

James R. Browning
James R. Browning
Special Attorney

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JOHN F. SONNETT

John F. Sonnett
Assistant Attorney General

GEORGE B. HADDOCK

George B. Haddock
Special Assistant to the Attorney General

MALCOLM E. LAFARGUE

Malcolm E. Lafargue
United States Attorney

50 In United States District Court
(Title Omitted)
(File Endorsement Omitted)
Order—Filed July 30, 1947

For the mutual convenience of the Court, the Government, and the defendants, in order to expedite and facilitate the trial of this cause, it is ordered that any and all defendants and any and all combinations of them, without waiving the right to separately argue the same, may sign jointly and present jointly any preliminary plea or motion in this cause (all without waiving their right to present their respective separate defenses during the main trial itself of this action by separate pleading, separate evidence, separate testimony, separate counsel, separate argument, separate objections and exceptions, separate briefs), and all without such action being taken as any evidence of the combination and conspiracy charged in the complaint in this cause.

This the 29th day of July, 1947.

/s/ BEN C. DAWKINS
Judge Presiding

We consent to the above

/s/ MALCOLM E. LAFARGUE
United States Attorney

51 In United States District Court
(Title Omitted)
(File Endorsement Omitted)
Answer—Filed Oct. 1, 1947

NOW COMES WOODLEY PETROLEUM COMPANY, made a respondent in the above entitled and numbered cause, and answers the complaint herein as follows:

• • •

52 In United States District Court

(Title Omitted)

(File Endorsement Omitted)

Notice of Motion—Filed Oct. 22, 1947

To:

C. W. Barnes, Jr.
National Bank of Tulsa Bldg.
Tulsa, Oklahoma

David E. Smitherman
209 Commercial Natl. Bank Bldg.
Shreveport, Louisiana

Sidney G. Myers
723 Giddens Lane Bldg.
Shreveport, Louisiana

J. Percy Rice
Russell V. Rogers, Jr.
Mercantile Bank Building
Dallas, Texas

Jr. R. Goff
1107 City Bank Building
Shreveport, Louisiana

Herold, Cousin & Herold
1625 Slattery Building
Shreveport, Louisiana

Blalock, Blalock, Lohman & Blalock
Gulf Building
Houston, Texas

A. M. Gee
539 S. Main Street
Findlay, Ohio

C. F. Currier
J. P. D'Artois
Commercial Natl. Bank Bldg.
Shreveport, Louisiana

Leon O'Quin
Arthur O'Quin
424 First Natl. Bank Bldg.
Shreveport, Louisiana

Charles L. Black
Dan Moody
Norwood Building
Austin, Texas

Jas. D. Heldt
930 Mercantile Bank Bldg.
Dallas, Texas

Leslie Moses
City Bank Building
Shreveport, Louisiana

Dixon Carrol
Ricou Brewster Building
Shreveport, Louisiana

Charles B. Wallace
Magnolia Building
Dallas, Texas

John T. Guyton
United Gas Building
Shreveport, Louisiana

Wilkinson, Lewis & Wilkinson
1525 Slattery Building
Shreveport, Louisiana

Vernon Roberts
Ada, Oklahoma

Sidney M. Cook
1500 Commercial Bank Bldg.
Shreveport, Louisiana

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53 Please take notice that the United States of America, Plaintiff in the above entitled action, by its attorneys, will appear in the above entitled Court at the earliest date convenient to court and counsel and move said Court for an order striking or limiting the Notice of Intention to Take Oral Depositions served upon the Plaintiff by the defendant Magnolia Petroleum Company. A copy of said motion is attached hereto.

JAMES R. BROWNING
James R. Browning
Special Attorney

WILLARD R. MEMLER
Willard R. Memler
Special Attorney

CERTIFICATE OF SERVICE BY MAIL

I, James R. Browning, Special Attorney, Department of Justice and an attorney of record in the above entitled case, certify that I have this day served a copy of the above notice and of the motion and exhibits attached thereto, to the defendants in said case, by mailing a copy thereof to the attorneys of record of each of said defendants at the addresses listed in said notice.

s/ JAMES R. BROWNING
James R. Browning

Dated this 21st day of October, 1947
at Washington, D. C.

54 In United States District Court

(Title Omitted)

Motion to Strike or Limit Defendant Magnolia Petroleum Company's Notice of Intention to Take Oral Depositions—Filed Oct. 22, 1947

Comes now the United States of America, Plaintiff in the above entitled cause, by its attorneys, and moves this Court to enter an order striking or limiting the Notice of Intention to Take Oral Depositions, served upon Plaintiff by defendant Magnolia Petroleum Company by mail on October 11, 1947, on the following grounds:

1. Said Notice was filed by defendant Magnolia Petroleum Company before answer without first obtaining leave of this Court.

2. Said Notice seeks to require the attendance of non-residents of the district in which the depositions are to be taken in a county other than that in which served and at a place more than 40 miles from the place of service without an order of the Court.

3. The depositions to be taken pursuant to said Notice could not serve either the purpose of discovery or as evidence in the above entitled action.

55 4. The examination contemplated by said Notice would relate to matters which are privileged and which are not relevant to the subject matter involved in the above entitled action.

5. The examination contemplated by said Notice would relate to information obtained by the attorneys and agents of the Plaintiff in anticipation of litigation and in preparation for trial, and the mental impressions, conclusions, opinions and legal theories of said attorneys, and no showing has been made that denial of disclosure concerning said matters will unfairly prejudice the defendant Magnolia Petroleum Company or cause said defendant undue hardship or injustice.

6. The taking of depositions contemplated by said Notice would cause unreasonable annoyance, embarrassment and oppression to the Plaintiff and to the witnesses.

7. Said Notice seeks to require the attendance of Tom C. Clark, Attorney General of the United States, at a place remote from his duties at the seat of Federal Government in Washington, D. C., to submit to examination in a preliminary hearing relating to matters of State and of a confidential nature and not relevant to the subject matter involved in the above entitled case, without any showing as to the possible materiality of the testimony of said Tom C. Clark. That said Notice is therefore unduly oppressive and harassing, is contrary to the public interest, and is against public policy.

8. Said Notice seeks to require the attendance of
56 Malcolm E. Lafargue, United States Attorney, Western District of Louisiana, at a place remote from his office and duties at Shreveport, Louisiana, to submit to examination in a preliminary hearing relating to matters concerning which he has no personal knowledge, without any showing as to the pos-

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sible materiality of his testimony. That said Notice is therefore unduly oppressive and harassing, is contrary to the public interest, and is against public policy.

9. That the examination contemplated by said Notice would relate to matters the disclosure of which is prohibited by Department of Justice Order Number 3229, issued pursuant to the authority of Revised Statute 161, 5 U. S. C. 22.

In support whereof Plaintiff attaches hereto a copy of said Notice of Intention to Take Oral Depositions (Exhibit "A"), a copy of the subpoena *duces tecum* addressed to Tom C. Clark, Attorney General of the United States (Exhibit "B"), a copy of the subpoena *duces tecum* addressed to Malcolm E. Lafargue, United States Attorney (Exhibit "C"), a copy of Department of Justice Order Number 3229 (Exhibit "D"), the affidavit of Tom C. Clark, Attorney General of the United States (Exhibit "E"), the affidavit of Malcolm E. Lafargue, United States Attorney (Exhibit "F"), and the affidavit of W. B. Watson Snyder, Special Assistant to the Attorney General (Exhibit "G").

57 Wherefore, Plaintiff respectfully prays this Court to enter an order suspending the taking of depositions by the defendant Magnolia Petroleum Company until such time as answer shall have been filed by said defendant and until said defendant shall have filed with this Court a statement setting forth the subject matters concerning which it proposes to question deponents.

JAMES R. BROWNING
James R. Browning
Special Attorney

WILLARD R. MEMLER
Willard Memler
Special Attorney

58 *Exhibit "A" to Motion*

In the District Court of the United States
For the Western District of Louisiana

Shreveport Division

Civil Action No. 2209

Notice of Intention to Take Oral Depositions
United States of America, plaintiff

v.

Cotton Valley Operators Committee, et al.,
defendants

To Hon. Tom C. Clark, Hon. John F. Sonnett, Hon. W. B. Watson Snyder, Hon. George B. Haddock, Hon. James R. Browning and Hon. Malcolm E. Lafargue, attorneys for plaintiff, The United States of America.

To Hon. A. M. Gee, Hon. C. F. Currier, Hon. J. P. D'Artois, Hon. Leon O'Quin and Hon. Arthur O'Quin, attorneys for defendant, The Ohio Oil Company.

To Hon. Charles L. Black and Hon. Dan Moody, attorneys for defendants, Fohs Oil Company and Stanolind Oil & Gas Company.

To. Hon. Jas. D. Heldt, attorney for defendant, Bodcaw Cotton Valley Company, Inc., and Grant Oil Company.

To Hon. Leslie Moses and Hon. C. W. Barnes, Jr., attorneys for Midstates Oil Corporation.

To Hon. David E. Smitherman, attorney for defendants, Root Petroleum Company, North American Oil Consolidated, Jabco, Inc., M. H. Marr, W. G. Ray, A. J. Hodges, W. C. Woolf, Dan W. Stewart, E. L. Stewart, Frank B. Treat.

To Sidney G. Myers, attorney for defendants Welori Lumber Corporation, Mrs. Nellie G. Myers and Sidney G. Myers.

To Hon. J. Percy Rice, and Russell V. Rogers, Jr., attorneys for defendant G. H. Vaughn.

To Hon. J. R. Goff, attorney for defendants Hunt Oil Company, H. L. Hunt and Roy Lee, Trustee of Hassie Hunt Trust.

To Hon. Sidney M. Cook, attorney for defendant Cotton Valley Operators Committee.

To Hon. John M. Madison, attorney for defendants Union Producing Company, Sunray Oil Corporation, A. G. Oliphant, Allene Oliphant, Chas. W. Oliphant, W. A. Delaney, Jr., E. V. Whitwell and H. W. Perritt.

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59 To Hon. Sidney L. Herold, attorney for defendant Woodley Petroleum Corporation; and also to Jack Blalock and Sumter P. Cousin, also attorneys for Woodley Petroleum Corporation. Woodley Petroleum Corporation is sometimes styled Woodley Petroleum Company.

Gentlemen:

Please take notice that on Monday, October 27, 1947 at 9:00 A. M., Central Standard Time, in the District Court Room of the 71st Judicial District of Texas in the Courthouse at Marshall, Harrison County, Texas (or as soon thereafter as their attendance can be obtained, subject to adjournment from time to time, and subject to the place of taking such depositions being moved to some other room in such Courthouse) the defendant, Magnolia Petroleum Company, will take the oral depositions of the following persons whose addresses are set opposite their respective names:

Tom C. Clark	Washington, D. C.
Malcolm E. Lafargue	Shreveport, Louisiana
Myron Blalock	Marshall, Texas
Jack Blalock	Marshall, Texas
L. G. Dufilho	Shreveport, Louisiana

And also please take notice that on Tuesday, October 28, 1947 at 9:00 A. M., Central Standard Time, in the District Court Room of the 124th Judicial District of Texas, in the Courthouse at Longview, Gregg County, Texas (or as soon thereafter as his attendance can be obtained, subject to adjournment from time to time, and subject to the place of taking such depositions being moved to some other room in such Courthouse) the defendant, Magnolia Petroleum Company will take the oral deposition of the following person whose address is set opposite his name:

Sylvester Dayson (or D'yson) Longview, Texas
Pres., Premier Oil
Refining Co. of Texas

And also please take notice that on Tuesday, October 28, 1947 at 2:00 P. M., Central Standard Time, in the District Court Room of the 7th Judicial District of Texas, in the Courthouse at Tyler, Smith County, Texas (or as soon thereafter as his attendance can be obtained, subject to adjournment from time to time, and subject to the place of taking such depositions being moved to some other room

in such Courthouse) the defendant, Magnolia Petroleum Company will take the oral deposition of the following person whose address is set opposite his name:

J. Zeppa	Tyler, Texas

And also please take notice that on Wednesday, October 29, 1947 at 9:00 A. M., Central Standard Time, in the District Court Room of the 11th Judicial District of Texas, in the Courthouse at Houston, Harris County, Texas (or as soon thereafter as their attendance can be obtained, subject to adjournment from time to time, and subject to the place of taking such depositions being moved to some other room in the Courthouse) the defendant, Magnolia Petroleum Company will take the oral depositions of the following persons whose addresses are set opposite their respective names:

60	J. R. Parten, Pres., Woodley Petroleum Company	Houston, Texas
	Marlin Sandlin	Houston 1, Texas
	Myron Blalock	Houston, Texas
	Jack Blalock	Houston, Texas

These depositions will be taken before a Notary Public who is not of counsel for any of the parties, and who is not interested in this cause.

You are invited to attend and cross examine.

WALACE HAWKINS
EARL A. BROWN
DIXON CARROLL

/s/ CHAS. B. WALLACE
Chas. B. Wallace
2311 Magnolia Building
Tel. C-4131, Sta. 248,
L. D. 246
P. O. Box 900
Dallas, Texas
Attorneys for Defendant,
Magnolia Petroleum Company

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61 *Exhibit "B" to Motion*

In the District Court of the United States
For the Western District of Louisiana

Shreveport Division

Civil Action No. 2209

Civil Subpena Duces Tecum
United States of America, plaintiff
v.
Cotton Valley Operators Committee, et al., defendants

To Tom C. Clark.

You are Hereby Commanded to appear in the District Court Room of the 71st Judicial District of Texas, in the Courthouse at Marshall, Harrison County, Texas, in the Eastern District of Texas on the 27th day of October, 1947 at 9:00 A. M., Central Standard Time of said day and also that you bring with you and produce at the time and place aforesaid:

(1) All reports (with exhibits attached thereto or filed therewith) made by agents or employees (or any agent or employee) of the Federal Bureau of Investigation to the Attorney General or to the Department of Justice of the United States during the period extending from February 1, 1946, to the date of institution of this action relating to: (a) The methods of operations conducted by defendant, Magnolia Petroleum Company alone or in association with the other defendants herein (or any number thereof) in or in connection with the production, processing, and marketing of liquid and gaseous hydrocarbons produced from the Cotton Valley Field in Webster Parish, Louisiana; (b) The methods of operations conducted by defendant, Magnolia Petroleum Company, alone or in association with the other defendants herein (or any number thereof) through or under the supervision of Cotton Valley Operators Committee in or in connection with the production, processing and marketing of liquid and gaseous hydrocarbons produced from the Cotton Valley Field of Webster Parish; (c) The functions performed by the Cotton Valley Operators Committee in or in connection with the production, processing and marketing of liquid and gaseous hydrocarbons produced from the Cotton Valley Field in Webster Parish.

(2) All letters, telegrams, and other communications of every kind or copies thereof (together with copies or replies thereto) received by the Department of Justice of the United States (during the period extending from August 1, 1945, to the date of institution of this action) from private individuals, corporations or associations (including parties to this action) relating to methods of operations conducted by defendant, Magnolia Petroleum Company, or any other defendant herein, alone or in association with other defendants (or any number thereof) in or in connection with the production, processing and manufacturing of liquid and gaseous hydrocarbons produced from the Cotton Valley Field of Webster Parish.

62 (3) All originals, copies and memoranda of any and all communications, whether oral or written or otherwise, whether as to the contents or the fact or date of such communications passing between the agents, servants, officials, attorneys, or employees of Premier Oil Refining Company of Texas, or between the agents, servants, officials, attorneys or employees of Woodley Petroleum Company during the years 1940, 1941, 1942, 1943, 1944, 1945, 1946, 1947, inclusive, and any attorney or employee of the Department of Justice, or the Office of the Attorney General of the United States of America, or the Federal Bureau of Investigation, and particularly, but without limiting the above, any and all such communications, letters, telegrams, complaints, briefs, etc., and particularly memoranda reports of oral conversations had, or the dates that conversations were had by and between Tom Clark, Myron Blalock, Jack Blalock, Sylvester Dawson, J. Zeppa, J. R. Parten, Marlin Sandlin, Sydney L. Herold, Sumter P. Cousin, and John F. Sonnett, W. B. Watson Snyder, Wendell Berge, or any other of the associates of such persons, whether in the Department of Justice, the Office of the Attorney General of the United States of America, or the Federal Bureau of Investigation, Woodley Petroleum Company, Premier Oil Refining Company of Texas, the law firm of Blalock, Blalock, Lohman & Blalock or the law firm of Herold, Cousin & Herold, or any combination of them, relating directly or indirectly to the building or operation of the Cotton Valley Unitization and Pressure Maintenance Plant at Cotton Valley, Louisiana, or relating directly or indirectly to the complaint on which this suit was filed, the investigation preceding the filing of this suit, the filing of this suit, and the prosecution and defense of this suit:

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then and there to testify and give your oral deposition on behalf of the defendant, Magnolia Petroleum Company, in the above suit pending in the District Court of the United States for the Western District of Louisiana, Shreveport Division, Civil Action No. 2209, wherein the United States of America is plantiff and Cotton Valley Operators Committee, *et al.*, are defendants.

Proof of service of a notice to take these depositions as provided for in Rules 30a ~~and 31a~~, Rules of Civil Procedure, has been duly made to the Clerk of the District Court of the United States for the Eastern District of Texas, Tyler Division, being the district in which such depositions are to be taken, and being the district in which such subpenas are requested, in which this subpena has been requested, ~~and wherein such subpena will be served~~, and this subpena is accordingly being issued under Rule 45d, Rules of Civil Procedure.

Such depositions are subject to being taken as soon after the time above mentioned as your attendance can be obtained, subject to adjournment from time to time, and subject to the place of taking such depositions being moved to some other room in such Courthouse.

WITNESS the Honorable Randolph Bryant, District Judge of the United States, this the 13th day of October, 1947.

RUTH B. HEAD, Clerk
Clerk
By /s/ DAVE M. PRICE
Deputy Clerk

63 *Exhibit "C" to Motion*

In the District Court of the United States
For the Western District of Louisiana

Shreveport Division

CIVIL ACTION No. 2209

CIVIL SUBPENA DUCES TECUM
UNITED STATES OF AMERICA, PLAINTIFF
v.
COTTON VALLEY OPERATORS COMMITTEE, ET AL., DEFENDANTS

To Malcolm E. Lafargue.

YOU ARE HEREBY COMMANDED to appear in the DISTRICT COURT ROOM of the 71st JUDICIAL DISTRICT OF TEXAS, in the Courthouse at Marshall, Harrison County, Texas, in the

Eastern District of Texas on the 27th day of October, 1947 at 9:00 A. M., Central Standard Time of said day and also that you bring with you and produce at the time and place aforesaid:

(1) All reports (with exhibits attached thereto or filed therewith) made by agents or employees (or any agent or employee) of the Federal Bureau of Investigation to the Attorney General or to the Department of Justice of the United States during the period extending from February 1, 1946, to the date of institution of this action relating to (a) The methods of operations conducted by defendant, Magnolia Petroleum Company alone or in association with the other defendants herein (or any number thereof) in or in connection with the production, processing, and marketing of liquid and gaseous hydrocarbons produced from the Cotton Valley Field in Webster Parish, Louisiana; (b) The methods of operations conducted by defendant, Magnolia Petroleum Company, alone or in association with the other defendants herein (or any number thereof) through or under the supervision of Cotton Valley Operators Committee in or in connection with the production, processing and marketing of liquid and gaseous hydrocarbons produced from the Cotton Valley Field of Webster Parish; (c) The functions performed by the Cotton Valley Operators Committee in or in connection with the production, processing and marketing a liquid and gaseous hydrocarbons produced from the Cotton Valley Field in Webster Parish.

(2) All letters, telegrams, and other communications of every kind or copies thereof (together with copies of replies thereto) received by the Department of Justice of the United States (during the period extending from August 1, 1945, to the date of institution of this action) from private individuals, corporations or associations (including parties to this action) relating to methods of operations conducted by defendant, Magnolia Petroleum Company, or any other defendant herein, alone or in association with other defendants (or any number thereof) in or in connection with the production, processing and manufacturing of liquid and gaseous hydrocarbons produced from the Cotton Valley Field of Webster Parish.

64 (3) All originals, copies and memoranda of any and all communications, whether oral or written or otherwise, whether as to the contents or the fact or date of such communications passing between the agents, serv-

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ants, officials, attorneys, or employees of Premier Oil Refining Company of Texas, or between the agents, servants, officials, attorneys or employees of Woodley Petroleum Company during the years 1940, 1941, 1942, 1943, 1944, 1945, 1946, 1947, inclusive, and any attorney or employee of the Department of Justice, or the Office of the Attorney General of the United States of America, or the Federal Bureau of Investigation, and particularly, but without limiting the above, any and all such communications, letters, telegrams, complaints, briefs, etc., and particularly memoranda reports of oral conversations had, or the dates that conversations were had by and between Tom Clark, Myron Blalock, Jack Blalock, Sylvester Dayson, J. Zeppa, J. R. Parten, Marlin Sandlin, Sydney L. Herold, Sumter P. Cousin, and John F. Sonnett, W. B. Watson Snyder, Wendell Berge, or any other of the associates of such persons, whether in the Department of Justice, the Office of the Attorney General of the United States of America, or the Federal Bureau of Investigation, Woodley Petroleum Company, Premier Oil Refining Company of Texas, the law firm of Blalock, Blalock. Lohman & Blalock, or the law firm of Herold, Cousin & Herold, or any combination of them, relating directly or indirectly to the building or operation of the Cotton Valley Unitization and Pressure Maintenance Plant at Cotton Valley, Louisiana, or relating directly or indirectly to the complaint on which this suit was filed, the investigation preceding the filing of this suit, the filing of this suit, and the prosecution and defense of this suit;

then and there to testify and give your oral deposition on behalf of the defendant, Magnolia Petroleum Company, in the above suit pending in the District Court of the United States for the Western District of Louisiana, Shreveport Division, Civil Action No. 2209, wherein the United States of America is plaintiff and Cotton Valley Operators Committee, *et al.*, are defendants.

Proof of service of a notice to take these depositions are provided for in Rules 30a and 31a, Rules of Civil Procedure, has been duly made to the Clerk of the District Court of the United States for the Eastern District of Texas, Tyler Division, being the district in which such depositions are to be taken, and being the district in which such subpenas are requested, in which this subpena has been requested, and wherein such subpena will be served, and this subpena is accordingly being issued under Rule 45d, Rules of Civil Procedure.

Such depositions are subject to being taken as soon after the time above mentioned as your attendance can be obtained, subject to adjournment from time to time, and subject to the place of taking such depositions being moved to some other room in such Courthouse.

WITNESS the Honorable Randolph Bryant, District Judge of the United States, this the 13th day of October, 1947.

RUTH B. HEAD, Clerk
Clerk

By /s/ DAVE M. PRICE
Deputy Clerk

65 *Exhibit "D" to Motion*

Office of the Attorney General
Washington, D. C.

May 2, 1939

ORDER No. 3229

Pursuant to authority vested in me by R. S. 161 (U. S. Code, Title 5, Section 22), it is hereby ordered:

All official files, documents, records and information in the offices of the Department of Justice, including the several offices of United States Attorneys, Federal Bureau of Investigation, United States Marshals, and Federal penal and correctional institutions, or in the custody or control of any officer or employee of the Department of Justice, are to be regarded as confidential. No officer or employee may permit the disclosure or use of the same for any purpose other than for the performance of his official duties, except in the discretion of the Attorney General, The Assistant to the Attorney General, or an Assistant Attorney General acting for him.

Whenever a subpoena *duces tecum* is served to produce any of such files, documents, records or information, the officer or employee on whom such subpoena is served, unless otherwise expressly directed by the Attorney General, will appear in court in answer thereto and respectfully decline to produce the records specified therein, on the ground that the disclosure of such records is prohibited by this regulation.

FRANK MURPHY
Attorney General

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66 *Exhibit "E" to Motion*

In the District Court of the United States
for the Western District of Louisiana

Shreveport Division

Civil Action No. 2209

UNITED STATES OF AMERICA, PLAINTIFF
v.
COTTON VALLEY OPERATORS COMMITTEE, ET AL.,
DEFENDANTS

District of Columbia: ss

TOM C. CLARK, being duly sworn, deposes and says:

That he is the Attorney General of the United States, and has his office and place of residence in Washington, D. C.

That his knowledge of the subject matter of the above entitled case was obtained from general summaries of fact which came to him from his subordinates in the Antitrust Division of the Department of Justice in the usual course of his supervisory duties as Attorney General of the United States.

That he has examined the subpoena *duces tecum* addressed to him in connection with the above entitled case, and that, in his opinion, the production of the records and documents requested therein would impede the Department of Justice in its enforcement of the law and would not be in the public interest.

That his attendance at Marshall, Harrison County, Texas, for the taking of his deposition in the above entitled cause would require his absence from official duties of much greater public significance, and would seriously impede the discharge of his duties as the Attorney General of the United States, and would not contribute evidence
67 relevant to the above entitled cause, nor contribute to the discovery of possible sources of such evidence.

/s/ TOM CLARK
Tom C. Clark

Subscribed and sworn to before me this 21 day of October, 1947.

/s/ GLADYS E. MCGAFFEY
Notary Public, D. C.

SEAL

68 *Exhibit "F" to Motion*

In the District Court of the United States
for the Western District of Louisiana
Shreveport Division
Civil Action No. 2209

UNITED STATES OF AMERICA, PLAINTIFF
v.
COTTON VALLEY OPERATORS COMMITTEE, ET AL.,
DEFENDANTS

State of Louisiana, }
Parish Caddo, } ss

MALCOLM E. LAFARGUE, being duly sworn, deposes and says:

That he is the United States Attorney for the Western District of Louisiana.

That the complaint in the above entitled case alleges a violation of Sections 1 and 2 of the Act of July 2, 1890, c. 647, 26 Stat. 209 (15 USC 1 & 2), commonly known as the Sherman Antitrust Act, primary responsibility for the enforcement of which has been vested in the Antitrust Division of the United States Department of Justice by the Attorney General of the United States.

That he has no personal knowledge of facts relevant to the subject matter of the above entitled case.

That he has no personal knowledge of, or information concerning, facts which would assist the defendant Magnolia Petroleum Company in discovering evidence or sources of evidence of use to it in the preparation of its defense in the above entitled case.

That he has examined the subpoena *duces tecum* addressed to him in connection with the above entitled case, and that he has neither knowledge, custody or control of any of the documents requested therein.

69 That his attendance at Marshall, Harrison County, Texas for the taking of his deposition in the above entitled cause would acquire his absence from duties of much greater public significance, would seriously impede the discharge of his duties as United States Attorney, and would not contribute evidence relevant to the above entitled cause, or to the discovery of possible sources of such evidence.

s/ MALCOLM E. LAFARGUE
Malcolm E. Lafargue
United States Attorney

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Sworn to and subscribed this 20th day of October, 1947.

s/ WILLIAM J. FLENIKEN
William J. Fleniken
Notary Public

SEAL

70 *Exhibit "G" to Motion*

In the District Court of the United States
for the Western District of Louisiana
Shreveport Division
Civil Action No. 2209

UNITED STATES OF AMERICA, PLAINTIFF
v.
COTTON VALLEY OPERATORS COMMITTEE, ET AL.,
DEFENDANTS

District of Columbia: ss

W. B. WATSON SNYDER, being duly sworn, deposes and says:

That he is employed as a Special Assistant to the Attorney General in the Antitrust Division of the United States Department of Justice.

That, as a part of his official duties in the Department of Justice, he has become, and is, personally familiar with the facts and circumstances relating to the inception and conduct of the investigation which led to the filing of the complaint herein, to the preparation of said complaint, and to the preparations of the Plaintiff for trial.

That on June 17, 1947, Plaintiff commenced the above entitled action by filing in this Court a complaint alleging that the Magnolia Petroleum Company and 33 other defendants had combined and conspired to restrain unreasonably and to monopolize interstate trade and commerce in violation of Section 1 and Section 2 of the Act of Congress of July 2, 1890, entitled "An Act to Protect Trade and Commerce Against Unlawful Restraints and Monopo-
71 lies," as amended (15 U. S. C. 1 and 2) commonly known as the "Sherman Act", and praying this Court for appropriate equitable relief.

That on October 13, 1947, the affiant received by mail enclosed in an envelope postmarked October 11, 1947, a document entitled "Notice of Intention to Take Oral Depositions", signed by attorneys for the defendant Magnolia Petroleum Company.

That he has examined the Notice of Intention to Take Oral Depositions filed by the defendant Magnolia Petroleum Company and the subpoenae *duces tecum* addressed to Tom C. Clark, Attorney General of the United States, and Malcom E. Lafargue, United States Attorney, by said defendant. That he has examined and is personally familiar with the documents and records to which said subpoenae *duces tecum* relate.

That the defendant Magnolia Petroleum Company has not filed an answer to the complaint in this Court nor served such answer upon affiant.

That the investigation which led to the filing of the complaint herein, the preparation of said complaint, and such preparations for trial as Plaintiff had completed at the date of this affidavit, were accomplished by or under the supervision of the affiant and other attorneys and agents of the Department of Justice, and that the participation of the Attorney General therein was limited to the approval, in the usual course of the routine procedures within the Department of Justice, of certain plans for investigation and of the drafted complaint.

That Malcom E. Lafargue, United States Attorney, did not participate in the inception or conduct of the investigation which led to the filing of said complaint, nor in the preparation of said complaint, and has neither custody nor control of any of the documents requested in the subpoena addressed to him.

That the documents and records the production of which would be required by the subpoenae *duces tecum* addressed to Tom C. Clark, Attorney General of the United
72 States, and Malcom E. Lafargue, United States Attorney, consist wholly of materials within the scope of Department of Justice Order Number 3229 issued pursuant to the authority of Revised Statute 161, 5 U. S. C. 22, of writings obtained or prepared by the attorneys and agents of the Plaintiff in anticipation of litigation and in preparation for trial, and writings containing the mental impressions, conclusions, opinions and legal theories of said attorneys.

That said subpoenae would require the production of substantially all of the documents and records pertaining to the above entitled case now in the files of the Department of Justice. That the removal of said documents and records to the State of Texas for production pursuant to the command of the subpoenae would make it impossible for the Department of Justice to take any further steps in connection with either the disposition of preliminary mat-

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ters, including pending motions, or of the preparation of the case for trial.

That most of said documents and records consist of memoranda, reports and communications between attorneys and agents of the Department of Justice, particularly of the Federal Bureau of Investigation, and would reveal the technique, methods, and sources utilized by the Department of Justice in the investigation of law violations. That the public disclosure of this information would seriously impede the Department of Justice in the enforcement of the law and would be against the public interest.

(Sgd.) W. B. WATSON SNYDER
W. B. Watson Snyder

Subscribed and Sworn to before me this 20th day of October, 1947.

(Sgd.) NELLIE G. PLUMLEY
Notary Public

SEAL

73 In the United States District Court

(Title Omitted)

Reply of Magnolia Petroleum Company to Motion to Strike or Limit Defendant Magnolia Petroleum Company's Notice of Intention to Take Oral Depositions—Filed Oct. 24, 1947

Now comes MAGNOLIA PETROLEUM COMPANY, defendant in the above numbered and entitled cause, and for its reply to the Motion to Strike or Limit Oral Depositions filed by the plaintiff UNITED STATES OF AMERICA, respectfully shows to the court the following:

1.

This defendant verily believes and shows to the Court that if permitted it will establish:

(a) That this cause of action was not filed in good faith;

(b) That the United States of America is only a nominal plaintiff in this case, but that the actual plaintiffs are Premier Oil Refining Company of Texas, its officers, directors and stockholders, for whose use and benefit this case was filed;

(c) That this case was filed to pay political debts to the political supporters of the present administration, who are the officers, directors and stockholders of the Premier Oil Refining Company of Texas;

(d) That this case was filed to further the financial
74 interests of the officers, directors and stockholders of Premier Oil Refining Company of Texas;

(e) That by virtue of such facts previously stated, the United States of America and the Attorney General of the United States of America are not coming into this Court with clean hands;

(f) That the purpose of this suit is itself to foster and perpetuate a monopoly in the supply of distillate and make available distillate to Premier Oil Refining Company of Texas from the Cotton Valley Field in Cotton Valley, Louisiana, and if there is any monopoly, combination or conspiracy present it is such monopoly, such combination and conspiracy between parties other than this defendant and the remaining defendants hereto;

(g) That the plaintiff and Premier Oil Refining Company of Texas, its officers, directors and stockholders, are using Woodley Petroleum Company, a defendant herein, to enter a sort of plea of guilty and thereby "run interference" for not only plaintiff but for Premier Oil Refining Company of Texas to either achieve such monopoly over distillate from the Cotton Valley Oil Field or to insure a future treble damage suit for the benefit of Premier Oil Refining Company of Texas, its officers, directors and stockholders, which said Woodley Petroleum Company is a sister corporation to Premier Oil Refining Company, there being now or formerly interlocking directors, interlocking officers, similar stock ownerships and similar financial backing, all of which requires a realignment of parties so that Woodley Petroleum Company by realignment of parties should either be dismissed or made a plaintiff, especially since Woodley Petroleum Company has been instrumental in obtaining and furthering the prosecution of this suit.

75 2.

That it is essential to the production of evidence and said testimony to support such charges that this defendant be allowed to proceed with the taking of the depositions for which it gave notice, and which depositions are set on Monday, October 27, Tuesday, October 28, and Wednesday, October 29, 1947.

3.

That this defendant construes and the Clerks of other United States District Courts construe the amended Fed-

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eral Rules as becoming effective on September 1, 1947; in the alternative, this defendant shows that Rule 86 may be ambiguous but at all events this defendant, under Rule 1 of the Federal Rules of Civil Procedure, here and now requests the Court to so construe said rules and to so apply said rules in this case to insure the just, speedy and inexpensive determination of this action by specifically ordering and permitting the taking of such depositions of such people at such places and such times. This defendant further shows that such depositions of the nonresidents are to be taken in Marshall, Harrison County, Texas, which is approximately thirty-eight (38) miles from Shreveport; and in the event that the same should be more than forty miles from the place of service, that such place could only have been a mile or so more than forty miles; and in this connection defendant specifically invokes the doctrine of *de minimie*, particularly since the United States District Attorney at Shreveport has been notified of the taking of such depositions, has been tendered his legal fees, is charged specifically by statute with the prosecution of such cases, is of counsel in this case, and of necessity should have to be present anyway; and if an order is necessary, this defendant specifically requests an order permitting the taking of the deposition of Malcolm E. Lafargue at Marshall, Harrison County, Texas, at 9:00 o'clock A. M., on Mon-
76 day, October 27, 1947; IN THE ALTERNATIVE this defendant prays for an order of the Court allowing it to take the oral deposition of not only Malcolm E. Lafargue but Tom Clark in Marshall, Harrison County, Texas, or some other place in the United States, at sometime certain and for an order commanding as officers of the Court their appearance at such time and place for such purpose. This defendant shows that such depositions are for the purpose of discovery and that such testimony will be used as evidence in the above entitled action for the purposes aforesaid and for all purposes under pleadings which it expects to file. This defendant denies that any privilege matters are involved but shows that no privilege exists between complainant and prosecuting attorneys and no privilege exists once the United States of America has entered the courts, as it has done here, as an ordinary private litigant. This defendant shows that unless it can prove through its attorneys as themselves officers of this Court that this suit is not filed in good faith and that plaintiff is not coming into Court with clean hands, that it has been deprived of its day in court and that its property and property rights will or may be taken from it, contrary to the law of the land and without due process of law.

4.

This defendant shows that these charges are made in good faith; that such depositions are not for the purpose of causing plaintiff any undue hardship or injustice or embarrassment or pressure but that such depositions are wholly necessary to this defendant in preparing its case for trial so that it can either insist on trial at the earliest possible date or be ready in case the Court should set the case for sometime in the immediate future. This defendant further shows that Malcolm E. Lafargue is of counsel and is charged by statute with the duty of prosecuting such character of cases and as such has access to all matters which he is required to present and produce and that
77 he should not be exempt any more than a partner or an officer in a corporation from complying with such subpoena, merely because he has no present personal knowledge or possession of any such documents. Defendant further shows that the mere order of the Department of Justice prohibiting disclosure is not binding on this Court and is not controlling on the relationships between this Court and officers of the Court such as the Attorney General of the United States and the United States District Attorney any more than a charter, by-laws, constitutions or minutes of a corporation prohibit the disclosure of its records to state and federal officials.

WHEREFORE, premises considered, this defendant prays that this Court allow it to proceed to take the depositions of Tom Clark and Malcolm E. Lafargue under such terms and conditions as this Court in the exercise of its discretion sitting as a chancellery in equity may see fit to impose; in the event the Attorney General of the United States and the United States District Attorney in this case should fail to appear, should fail to make such discovery and should fail to obey such subpoena *duces tecum* in whole or in part, directly or indirectly, then this defendant prays that this case be dismissed because of such failure.

CHAS. B. WALLACE
Charles B. Wallace
Attorney for Defendant, Magnolia Petroleum Company
2311 Magnolia Building (Box 900)
Dallas Texas
Telephone: Central 4131, Ext. 248, LD 246

78 *Duly Sworn to by Chas. B. Wallace.*
Jurate omitted in printing. (All in italics.)
(File Endorsement Omitted)

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79 In United States District Court

(Title Omitted)

Motion for Production of Documents—Filed Oct. 25, 1947

Defendant The Ohio Oil Company moves the Court for an order requiring plaintiff to produce and permit defendant to inspect and copy:

1. All reports (with exhibits attached thereto or filed therewith) made by agents or employees (or any agent or employee) of the Federal Bureau of Investigation to the Attorney General or to the Department of Justice of the United States during the period extending from February 1, 1946, to the date of institution of this action relating to:

(a) The methods of operations conducted by this defendant alone or in association with the other defendants herein (or any number thereof) in or in connection with the production, processing, and marketing of liquid and gaseous hydrocarbons produced from the Cotton Valley Field in Webster Parish, Louisiana;

(b) The methods of operations conducted by this defendant alone or in association with the other de-
80 fendants herein (or any number thereof) through or under the supervision of Cotton Valley Operators Committee in or in connection with the production, processing and marketing of liquid and gaseous hydrocarbons produced from the Cotton Valley Field of Webster Parish;

(c) The functions performed by the Cotton Valley Operators Committee in or in connection with the production, processing and marketing of liquid and gaseous hydrocarbons produced from the Cotton Valley Field in Webster Parish.

2. All letters, telegrams, and other communications of every kind or copies thereof (together with copies of replies thereto) received by the Department of Justice of the United States (during the period extending from August 1, 1945, to the date of institution of this action) from private individuals, corporations or associations (including parties to this action) relating to methods of operations conducted by this defendant or any other defendant herein, alone or in association with other defendants (or any number thereof) in or in connection with the production, processing and manufacturing of liquid and gaseous hydrocarbons produced from the Cotton Valley Field of Webster Parish.

Plaintiff has (through the Attorney General of the United States, under whose direction, supervision and control this action is maintained) the possession and custody of each of the documents mentioned, which contain evidence relating to matters within the scope of the examination permitted by Rule 26(b), as more fully shown by the affidavit attached hereto.

A. M. GEE
539 South Main Street
Findlay, Ohio

81 s) G. F. CURRIER
G. F. Currier
Commercial National Bank Building
Shreveport, Louisiana

s) J. P. D'ARTOIS
J. P. D'Artois
Commercial National Bank Building
Shreveport, Louisiana

BLANCHARD, GOLDSTEIN, WALKER & O'QUIN
By ARTHUR O'QUIN
Member of Firm
424 First National Bank Building,
Shreveport, Louisiana
Attorneys for Defendant The Ohio Oil Company.

(File Endorsement Omitted)

82 *Affidavit of J. P. D'Artois*

State of Louisiana, }
Parish of Caddo. }

Before me, the undersigned authority, personally came and appeared J. P. D'ARTOIS, who, being first sworn, deposes and says that he is a member of the legal staff of The Ohio Oil Company, is a member of Cotton Valley Operators Committee, and has actively served as Secretary thereof at all times referred to herein; that over a period of time extending from approximately February, 1946, to approximately June, 1946, certain individuals identifying themselves as agents or employees of the Federal Bureau of Investigation from time to time approached the Cotton Valley Operators Committee and members thereof with requests that they (the agents referred to) be allowed to examine all books, records and other information contained in the files of the Committee relating to operations con-

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ducted in connection with the production, processing and manufacturing of liquid and gaseous hydrocarbons produced from the Cotton Valley Field for the purpose of enabling them to furnish a report thereof to the Department of Justice of the United States to permit that Department to consider the nature and methods of operations conducted in respect to the application of the anti-trust laws of the United States;

That during the period mentioned, such agents of the Federal Bureau of Investigation, namely, Gaston C. Thompson (accountant) and Reed W. Thompson (attorney) were (for the purposes stated) given full and complete access to all records and information in the custody or within the control of Cotton Valley Operators Committee or available from any source whatever through that Committee and then withdrew or made copies or memoranda of all contracts, instruments, documents and other records (in the possession of Cotton Valley Operators Committee or made available through that Committee) deemed by them to be relevant to the investigation being conducted.

83 That during the period referred to, affiant was informed by one of the agents referred to that the investigation being conducted was brought about as the result of requests made by individuals (or a private corporation or corporations for whom they acted), whose names, however, were not specified; and after the conclusion of the investigations mentioned, affiant was informed by the agents mentioned that a full and complete report had been made to the Department of Justice of the United States or to the Attorney General of the United States, disclosing in detail the results of their investigations in respect to the methods of all operations conducted in connection with the production, processing and marketing of all oil, gas and other minerals produced from the Cotton Valley Field, the nature, character and extent of which, however, was not revealed to affiant;

That these employed in the office of the Attorney General refuse to voluntarily disclose the nature of the reports and communications referred to and the contents thereof, as the result of which the extent to which records, documents, etc. were withdrawn from the files of Cotton Valley Operators Committee or obtained from other sources and the nature of the evidence included in the reports made to the Attorney General are unknown to persons outside the Department of Justice;

That to permit the government to refuse to disclose the information obtained through the investigation mentioned will materially hamper and delay defendants in their preparation for trial, will deprive them of materials required for the cross examination of witnesses and for a proper preparation for trial and will unfairly operate to their prejudice.

s) J. P. D'ARTOIS

Sworn to and subscribed before me, Notary, on this 24th day of October, 1947.

GEORGE M. SIMPSON
Notary Public in and for
Caddo Parish, Louisiana

(SEAL)

(File Endorsement Omitted)

84 In the United States District Court

(Title Omitted)

(File Endorsement Omitted)

Joint Reply of Magnolia Petroleum Company to all Motions to Strike, Motion to Vacate, or Limit Defendant Magnolia Petroleum Company's Notice of Intention to Take Oral Depositions—Filed Nov. 4, 1947

Now comes MAGNOLIA PETROLEUM COMPANY, defendant in the above numbered and entitled cause, and for its joint reply to the Motions to Strike, Motions to Vacate or Limit, Notices to take Oral Depositions filed by the plaintiff UNITED STATES OF AMERICA, defendant, Woodley Petroleum Company, its sister corporation, Premier Oil Refining Company of Texas, and the other individual movants herein, respectfully shows to the court the following:

1.

This defendant verily believes, has good reasons to believe and shows to the Court that if permitted it will establish:

(a) That this cause of action was not filed in good faith;

(b) That the United States of America is only a nominal plaintiff in this case, but that the actual plaintiffs are Premier Oil Refining Company of Texas, its present or former officers, directors and stockholders, for whose use and benefit this case was filed;

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(c) That this case was filed to pay political debts to the political supporters of the present administration, who are the present or former officers, directors and stockholders of the Premier Oil Refining Company of Texas;

(d) That this case was filed to further the financial interests of the present or former officers, directors and stockholders of Premier Oil Refining Company of Texas;

85 (e) That by virtue of such facts perviously stated, the United States of America and the Attorney General of the United States of America are not coming into this Court with clean hands;

(f) That the purpose of this suit is itself to foster and perpetuate a monopoly in the supply of distillate and make available distillate to Premier Oil Refining Company of Texas from the Cotton Valley Field in Cotton Valley, Louisiana, and if there is any monopoly, combination or conspiracy present it is such monopoly, such combination and conspiracy between these parties other than this defendant and the remaining real defendants hereto;

(g) That the plaintiff and Premier Oil Refining Company of Texas, its officers, directors and stockholders, are using Woodley Petroleum Company, a defendant herein, to enter a sort of plea of guilty and thereby "run interference" for not only plaintiff but for Premier Oil Refining Company of Texas to either achieve such monopoly over distillate from the Cotton Valley Oil Field or to insure a future treble damage suit for the benefit of Premier Oil Refining Company of Texas, its officers, directors and stockholders, which said Woodley Petroleum Company is a sister corporation to Premier Oil Refining Company, there being now or formerly interlocking directors, interlocking officers, similar stock ownerships and similar financial backing, all of which requires a realignment of parties so that Woodley Petroleum Company by realignment of parties should either be dismissed or made a plaintiff, especially since Woodley Petroleum Company has been instrumental in obtaining and furthering the prosecution of this suit; that the complaint on which this suit was filed was made by persons who are, or have been, officers, stockholders and members of the Boards of Directors of both Premier Oil Refining Company of Texas and Woodley Petroleum Company, and that some, or all of them, have at all times relevant to the taking of such depositions been the counsel and lawyers for both of said two corporations; that part and parcel of the over all plan of said complaint and the filing of such suit called for Wood-

ley Petroleum Company to be made a defendant, though in fact, Woodley Petroleum Company was never guilty of any combination, conspiracy, monopoly or restraint of trade with any of the other defendants in this suit in the
86 operation of the Cotton Valley Plant, which fact was well known to the plaintiff herein, but that notwithstanding the same, Woodley Petroleum Company was made a defendant for the purpose of giving the complainants who are some of the beneficiaries of this law suit a seat at plaintiff's counsel table, and to give Woodley Petroleum Company as a nominal defendant and as an alleged co-conspirator the privilege of filing a sort of plea of guilty, and giving Woodley Petroleum Company a right to make an attack upon its co-defendants;

(h) That the complaint in this case was filed by persons who are, or have been, officers, directors and stockholders of both Woodley Petroleum Company and Premier Oil Refining Company of Texas; that such persons number among them the national committeeman of the party now in control of the executive branch of our national government, another man who is a former appointee of a high political office, and that Premier Oil Refining Company of Texas and Woodley Petroleum Company number among their present or former officers, directors and stockholders other persons who have contributed thousands and thousands of dollars to the campaign funds of this same political party, and that such persons actually control the functions of such party in the State of Texas and the liaison between such state political party in Texas and the national organization; that the president of Woodley Petroleum Company is one and the same person as the Chairman of the Board of Premier Oil Refining Company of Texas; that such complainants and such persons exert vast political influence, can expect, demand and receive political favors for themselves and for their corporate organizations since they have the ear and open doors to every bureau, commission and office-holder in Washington, D. C., and that such complainants and such persons did demand and did receive the institution of this suit as a political favor to them; that the real defendants in this case knew five years ago that this suit would be filed, if at any time such political favorites and their respective corporations were not supplied with distillate, because on such occasion complainants and the beneficiaries of this law suit were able, through their vast political influence and political connections to block C. V. O. C. in its application for priorities in order to mann-

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facture toluene for the war effort until such com-
87 plainants and their corporation, Premier Oil Refining Company of Texas, were insured a supply of distillate for its own personal use and benefit, and this defendant shows that it verily believes, has good reasons to believe, and shows to the court that, if permitted, it will establish that the filing of this suit followed the same and identical pattern; that it believes and has good reason to believe that the FBI report as result of between six and ten months investigation into the affairs of C. V. O. C. showed no violation of the antitrust laws; that it believes and has good reason to believe that the then Head of the Antitrust Division of the Department of Justice in his investigation into the law and facts found no violation of the Sherman Antitrust Law; that this defendant believes and has good reason to believe that the Attorney General of the United States filed his case for the reason—and this defendant verily believes it is quoting substantially his own words—"to get the Blalocks and Parten off his back";

(i) This defendant would show that movants who would assert the privilege as attorneys and growing out of alleged confidential communications between them and Woodley Petroleum Company and Premier Oil Refining Company of Texas are, or have been, officers in said corporations, are, or have been, directors in said corporations and are, or have been, stockholders in such corporations and that whatever steps they took, whether actions, communications, or otherwise, both to them and from them, were done in their official capacity as such officers, directors and stockholders and that such actions inured, or were planned to so inure, to their personal and private benefit and were so done in their official capacity; that the transactions had by other movants with such attorneys were in such course of business of such corporations in such capacities and for the same purpose.

(j) This defendant shows that the United States of America, by filing this suit, has come into court as an ordinary litigant after having had its agents ransack the files of the C. V. O. C. for a period of six and ten months, and this de-
fendant further shows to the court that it should be
88 afforded an equal opportunity to know on what this suit is actually based in order to properly prepare itself for trial, in order to obtain rebutting testimony, in order to prepare its pleadings, in order to protect itself from being surprised by the unexpected admission of testimony or evidence on the trial, and in this connection, it

must know what statements the investigating body of plaintiff took and what records of C. V. O. C. and other parties the FBI took, photostated, or made records of same; in this connection, defendant shows that it does not now know on what this suit was based, is not in position to properly prepare its case for trial, or admit or deny the allegations of said petition, nor does this defendant know what statements the FBI took, or from whom, nor does it know what records the FBI took, photostated, or cataloged;

(k) This defendant shows that there is no private or confidential communication between complainants and the Prosecuting Attorney, especially under the circumstances, passing between complainants in this case and the Office of the Attorney General or other law enforcement agencies of the United States of America;

(l) This defendant shows that in addition to needing such testimony to properly prepare its case for trial that this court needs such information in order to properly know all of the background of this case, and in order to properly balance the equities, apply the doctrine of comparative injury and determine whether or not the relief sought in this case would actually interfere with the paramount public interest, for at this time defendant verily believes that the relief sought here, and that the evidence sought to be obtained here will disclose that this suit has for its purpose the benefiting of one favored group to the detriment of as many as a thousand persons, most of whom are royalty owners and not even parties hereto;

(m) This defendant shows that unless it has access to the proof of such matters, and it has no present information of any other source from which competent evidence can be obtained of most of such matters than the depositions of such persons and the production of such instruments, then it has been deprived of its day in court and its
89 property and property rights will, or may be taken from it contrary to the law of the land and without due process of law;

(n) Defendant further shows that such persons and such officials have access to and control over all matters which they are required to present and produce and that they should not be exempted from complying with such subpoena merely because they claim to have no present personal knowledge of and claim to have no present personal possession of such instruments; defendant further shows that the mere order of the Department of Justice prohibiting

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this disclosure is not binding on this court and is not controlling on the relationships between this court and officers of this court, such as the Attorney General of the United States and the United States District Attorney, any more than a charter, by-laws, constitution or minutes of a corporation could prohibit the disclosure of its records to state or federal officials.

(o) This defendant shows that these allegations are made in good faith, that the taking of such depositions is not for the purpose of causing plaintiff or any other person any undue hardship, injustice, embarrassment or oppression, but that since this law suit was filed by plaintiff at the insistance of most of such persons from whom such depositions are sought to be obtained, that the taking thereof is wholly necessary to this defendant in preparing its case for trial now so that it can either insist on a trial at the earliest possible date, or so that it can be ready in case the government insists on setting the case for trial, or so that it can be ready in case the court should set this matter for trial for some time in the immediate future; defendant shows that such discovery will probably uncover facts and defenses not now known or now anticipated by it.

2.

This defendant here and now requests the court to so construe the Rules of Civil Procedure and to so apply not only said rules, but the procedure in this case, so that under Rule 1 of the Federal Rules of Civil Procedure there can be insured in this case the just, speedy, and inexpensive determination of this action by specifically ordering and permitting the taking of the depositions of all such people, and compelling the production of all matters
90 set out in the Subpoenas *Duces Tecum* previously issued. In this connection, defendant prays the court to enter an order setting the place and time for the taking of such depositions and this defendant prays the court to issue an order enumerating the instruments which such witness will be required to then and there produce, and in this connection, this defendant suggests that these depositions be taken before this Honorable Court, and that if this court deems it fitting and proper that it first require the production before it of all such instruments enumerated in such Subpoenas *Duces Tecum*, with such instruments to be accompanied then and there by an affidavit of each of the witnesses subpoenaed, stating (a) that the instruments produced are all the instruments in existence

covered by such subpoena; (b) that no instrument has been destroyed or removed from said file and not produced; (c) that no instrument has been replaced or substituted for another one; and (d) that no instrument produced has been altered.

WHEREFORE, premises considered, this defendant prays that this court allow it to proceed to take the depositions of such persons, that this court order all such witnesses to appear and produce the instruments enumerated in their respective Subpoenas *Duces Tecum*, that this court allow this defendant the widest latitude possible in its depositions and discovery in order to enable it to prepare its pleadings, evidence and testimony for trial, all under such terms and conditions as this court in the exercise of its discretion sitting as chancellor in equity may see fit to impose; in the event the Attorney General of the United States and the United States District Attorney in this case should fail to appear, should fail to make such discovery and should fail to obey such Subpoenas *Duces Tecum*, in whole or in part, directly or indirectly, then this defendant prays that this case be dismissed as to it because of such failure; this defendant further prays that this matter be kept open and subject to such other motions and orders from time to time as may be deemed necessary.

CHAS. B. WALLACE

Chas. B. Wallace
Attorney for Defendant, Magnolia Petroleum Company
2311 Magnolia Building (Box 900)
Dallas Texas
Telephone: C-4131, Ext. 249, LD 246

91 *Duly sworn to by Chas. B. Wallace.*
Jurat omitted in printing. (All in italics.)

92 In United States District Court

(Title Omitted)

More Definite Statement—Filed Nov. 21, 1947

1. In response to Defendants' Request Number 1, the Plaintiff states that the Cotton Valley Unitization and Pressure Maintenance Agreement does not in any respect relate to any business or activities not approved by the Commissioner of Conservation of Louisiana through the orders referred to in paragraph 10 of the complaint herein as Number 10-B and Number 10-C.

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2. In response to Defendants' Request Number 4, the Plaintiff states that the term "processing" as used in paragraph 11 of the complaint herein, means and is intended to describe, any and all of the operations engaged in by the defendants or others for the purpose of extracting, separating and refining separate hydrocarbons and hydrocarbon products from the natural flow of liquid and gaseous hydrocarbons produced from the Field, after the separation from the natural flow of a residue which is reinjected into the underground reservoirs of the Field.

3. In response to Defendants' Request Number 10, the Plaintiff states that the defendants undertook to exclude others from the business of extracting, processing, and refining liquid and gaseous hydrocarbons produced from the Field by totally occupying that business themselves.

93 4. In response to Defendants' Request Number 12, the Plaintiff states that the defendants undertook to exclude others from the business of distributing and selling hydrocarbons produced by them and taken from the Field or hydrocarbons jointly extracted, processed or refined by Defendants by totally occupying that business themselves.

5. In response to the last clause of Defendants' Request Number 15, the Plaintiff states that the phrase "prices, terms and conditions of sale," as used in paragraph 13(d), of the complaint herein, is a phrase of general commercial usage which means and is intended to describe all of the elements of consideration involved in the sale by the Defendants of the hydrocarbons and hydrocarbon products described in paragraph 13(d), including the price, time and place of delivery, condition of delivery, terms of payment, and similar elements of the consideration. The words "conditions of sale" were not intended to mean or to describe particular elements of the consideration, as distinguished from those elements included in the words "prices" and "terms" of sale.

6. In response to the first clause of Defendants' Request Number 18, the Plaintiff states, with reference to paragraph 16(a) of the complaint, that all persons and companies other than the Defendants who might otherwise have engaged in the business of extracting, processing and refining hydrocarbons produced from the Field were excluded from that business by the total occupation of that business by Defendants.

7. In response to the first clause of Defendants' Request Number 19, the Plaintiff states, with reference to paragraph

16(b) of the complaint, that all persons and corporations other than the Defendants who might otherwise have engaged in the business of selling and distributing liquid and gaseous hydrocarbons produced from the Field, or
94 hydrocarbon products processed, extracted or refined from said hydrocarbons, were excluded from that business by the total occupation of that business by Defendants.

8. In response to the first clause of Defendants' Request Number 20, the Plaintiff states, with reference to paragraph 16(c) of the complaint, that all persons and corporations other than the Defendants who might otherwise have engaged in the business of transporting liquid and gaseous hydrocarbons produced from the Field, or hydrocarbon products processes, extracted or refined from said hydrocarbons, were excluded from that business by the total occupation of that business by Defendants.

Respectfully submitted,

s) JAMES R. BROWNING
James R. Browning
Special Attorney

s) MALCOLM E. LAFARGUE
Malcolm E. Lafargue
United States Attorney

WILLARD R. MEMLER
Special Attorney

(File Endorsement Omitted)

95 In the United States District Court
For the Western District of Louisiana

Shreveport Division

Civil Action No. 2209

UNITED STATES OF AMERICA
vs.
COTTON VALLEY OPERATORS COMMITTEE, THE OHIO OIL Co., *et al.*

For Plaintiff: Tom C. Clark, Atty. Gen., John F. Sonnett, Geo. B. Haddock, W. B. Watson Snyder, & Jas. R. Browning, Spl. & Assts. Atty. Gen., Washington, D. C.; Malcolm E. Lafargue, U. S. Attorney.

For Defendants: John M. Madison; W. S. Wilkinson; Wilkinson, Lewis & Wilkinson; Jno. T. Gayton, J. R. Goff, Sidney G. Meyers, all of Shreveport, La.; Vernon Roberts, Ada, Okla.

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Opinion—Filed Jan. 21, 1948

DAWKINS, *J:*

The Government brought this suit under the provisions of Section 4 of the Act of July 2, 1890, c. 647, 26 Stat. 209, commonly known as the Sherman Anti-Trust Law, charging some fifteen corporations and eighteen individuals, with conspiring to "restrain unreasonably and to monopolize trade and commerce in the liquid and gaseous carbohydrates" taken from the Cotton Valley Field of Webster Parish, as follows:

96 "Said combination and conspiracy has consisted of a continuing agreement and concert of action among the defendants the substantial terms of which have been and are the defendants.

"(a) Agree to jointly engage in and exclude others from the business of extracting, processing and refining various separate hydrocarbons and hydrocarbon products from over 85% of the natural flow of liquid and gaseous hydrocarbons produced from said Field and not reinjected therein, which said business of extracting, processing and refining was in addition to that required to separate said hydrocarbons from said natural flow or to reinject the residue thereof into the Field;

"(b) Agree to jointly engage in and exclude others from the business of distributing and selling all of the hydrocarbons and hydrocarbon products jointly extracted, processed or refined by the defendants from over 85% of the natural flow of liquid and gaseous hydrocarbons produced from the Field and not reinjected therein.

"(c) Agree to jointly sell through channels of distribution jointly selected by the defendants all of the hydrocarbons and hydrocarbon products extracted, processed or refined by the defendants from over 85% of the natural flow of liquid and gaseous hydrocarbons produced from the Field and not reinjected therein.

"(d) Agree upon fixed and uniform prices and terms and conditions of sale for each of the hydrocarbons and hydrocarbon products extracted, processed or refined by the defendants from over 85% of the natural flow of liquid and gaseous hydrocarbons produced from the Field and not reinjected therein, and agree to sell each of said hydrocarbons and hydrocarbon products

at the said fixed and uniform prices and upon said terms and conditions of sale."

The bill itself, under the heading "Background" enumerates the conditions prevailing in the field, which brought about the original joint action of the defendants as follows:

"The Cotton Valley Oil Field is located in Webster Parish in the State of Louisiana. Whenever the term 'Field' is hereinafter used, it is intended to mean the said Cotton Valley Oil Field including the natural underground reservoirs in said Field in which hydrocarbons are present.

"The Field contains hydrocarbons in both liquid and gaseous forms. These hydrocarbons are under high pressure within the reservoirs, and in the exploitation of the Field this pressure is utilized to bring both the liquid and gaseous hydrocarbons to the surface of the ground. This flow of liquid and gaseous hydrocarbons as it reached the surface is sometimes hereinafter referred to as the 'natural flow' from the Field. The greater part of the hydrocarbons in the Field are found at depths in excess of 8,000 feet. The ratio of gaseous to liquid hydrocarbons in the Field is in excess of 10,000 cubic feet of gas to one barrel of liquid. The cost of producing liquid hydrocarbons from individual wells is high. Rights to produce hydrocarbons from the Field are owned by more than thirty individuals and corporations. The production of gaseous and liquid hydrocarbons from the Field without
97 reinjecting a part thereof into the Field would result in the rapid reduction of the underground gas pressure necessary to the ultimate recovery of both liquid and gaseous hydrocarbons from the Field. It is economically impracticable for individual owners to reinject a part of the gaseous and liquid hydrocarbons into the Field.

"In an effort to find a solution to these problems the producers in the Field erected an experimental injection station in 1939. From this experiment it was determined that certain of the liquid and gaseous hydrocarbons could be separated from the natural flow from the reservoirs and the residue could be returned to the reservoirs under pressure, permitting the exploitation of the Field without serious reduction of the pressure

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within the natural reservoirs. To accomplish this objective the producers of over half of all gaseous and liquid hydrocarbons from the Field entered into an agreement in the spring of 1940 which is known as the Cotton Valley Unitization and Pressure Maintenance Agreement, hereinafter referred to as 'the Agreement'. Thereafter other producers of hydrocarbons from the Field joined and became parties to the Agreement, and at the time of the filing of this complaint the parties thereto produced in excess of 90% f all hydrocarbons taken from the Field. All of the defendants herein are parties to the Agreement or participated in activities related thereto. The purpose of the Agreement as set out in the preamble thereof is that 'of more properly conserving the resources of said common oil, gas and other hydrocarbon field, pool or reservoir, and for the prevention of underground and surface waste'. The agreement provides for the unitization of liquid and gaseous hydrocarbons within a substantial part of the underground reservoirs of the Field and the pooling of lands containing these substances, for the production of these substances by joint agency to be known as the Operators' Committee, and the apportionment of the substance so produced to the owners of individual rights in the area covered by the Agreement on an agreed upon basis. The Operators' Committee is authorized by the Agreement to exercise the sole right to drill in the area covered by the Agreement with certain limited exceptions, to enter into contracts for the extension of that area and to plan, co-ordinate and execute the development and operations within that area for unitized substances. As a part of this development the Operators' Committee is specifically authorized to construct and maintain a modern recycling, pressure maintenance and liquid hydrocarbon extraction and processing plant. The Agreement stipulates that all unitized substances produced from the area covered by the Agreement, except such as may be used for production or development purposes or for repressuring or recycling, shall be apportioned among the owners and allocated on an acreage basis to the several tracts of land comprising such area except that the Operators' Committee shall be empowered to dispose of the gas produced for all owners.

"Pursuant to power delegated by Act Number 225 of the Legislature of the State of Louisiana of 1936, and by Act Number 157 of the Legislature of the State of Louisiana, of 1940, the Commissioner of Conservation of the State of Louisiana issued Order Number 10-B, dated July 1, 1940, and Order Number 10-C, dated January 28, 1941, approving the Agreement only in so far as it provided for the unit operation and development of the area covered by the Agreement and the reinjection into the reservoir under pressure of a part of the liquid and gaseous hydrocarbons produced from said Field."

98 The results of the alleged acts in restraint of trade and commerce are listed under the heading "Effects".

"The aforesaid combination and conspiracy and the acts and things done by defendants informing and effectuating said combination and conspiracy, were intended by the defendants to and have had the following effects:

(a) Excluded other persons and companies from the business of extracting, processing and refining various separate hydrocarbons and hydrocarbon products, from over 85% of the natural flow of liquid and gaseous hydrocarbons produced from the Field and not reinjected therein:

(b) Excluded persons and companies other than the defendants and those jointly selected by the defendants from an opportunity to engage in the business of selling and distributing liquid and gaseous hydrocarbons jointly produced by the defendants from said Field and the hydrocarbon products jointly processed, extracted or refined by the defendants therefrom:

(c) Excluded persons and companies other than the defendants and those jointly selected by the defendants from an opportunity to engage in the business of transporting liquid and gaseous hydrocarbons jointly produced by the defendants from said Field and the hydrocarbon products jointly processed, extracted or refined by the defendants therefrom; and

(d) Eliminated competition among the defendants, and between the defendants and others, in the extraction, processing and refining, in the transportation, in

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the distribution, and in the sale of hydrocarbon products extracted from over 85% of the natural flow of liquid and gaseous hydrocarbons produced from the Field and not reinjected therein."

The bill was filed on June 17, 1947. Numerous motions were presented by various defendants, and on October 22, 1947, the Government filed a motion to "strike or limit" defendant, Magnolia Petroleum Company's application to take oral depositions. Up to that time there was no record in this court of said Company's effort to take such depositions for the process had been gotten out in the Eastern and Southern Districts of Texas. Attached to the motion to strike were copies of notices, addressed to the Attorney General and some four of his assistants, to the United States Attorney of this district, and to the numerous attorneys representing the corporations and individuals, that the depositions would be taken as follows: On October 27, 1947, Tom Clark, Attorney General, Malcolm E. Lafargue, United States Attorney for this district, Myron
99 Blalock and Jack Blalock of Marshall, Texas, and L. G. Dufilho of Shreveport in the State Court House at Marshall, Texas; on October 28th, depositions of Sylvester Dayson (or Dyson), president of Premier Oil Refining Co. of Longview, Texas, and J. Zeppa of Tyler in the state courthouse of Tyler, Texas; and on October 29th, J. R. Parten, president Woodley Petroleum Co., Marlin Sandlin, Myron Blalock and Jack Blalock of Houston, Texas, in the state courthouse in that city.

There was also attached to said motions to strike, of the plaintiff, subpoenas *ducem tecum*, or to produce, addressed to the Attorney General and to the said U. S. Attorney of this district, as follows: to Tom Clark, Attorney General, demanding that he produce at Marshall, Texas, at the time of giving his deposition on October 27, 1947, documents and records as set forth in the footnote below, [1] to Malcolm

[1] "All letters, telegrams, and other communications of every kind or copies thereof (together with copies of replies thereto) received by the Department of Justice of the United States (during the period extending from August 1, 1945, to the date of institution of this action) from private individuals, corporations or associations (including parties to this action) relating to methods of operations conducted by defendant, Magnolia Petroleum Company, or any other defendants herein, alone or in association with other defendants (or any number thereof) in or in connection with the production, processing and manufacturing of liquid and gaseous hydrocarbons produced from the Cotton Valley Field of Webster Parish."

E. Lafargue, United States Attorney, documents and records as shown in footnote.[2]

100 The grounds of the motion to strike or limit were as follows:

"1. Said Notice was filed by defendant Magnolia Petroleum Company before answer without first obtaining leave of this Court.

"2. Said Notice seeks to require the attendance of non-residents of the district in which the depositions are to be taken in a county other than that in which served and at a place more than 40 miles from the place of service without an order of the Court.

"3. The depositions to be taken pursuant to said Notice could not serve either the purpose of discovery or as evidence in the above entitled action.

"4. The examination contemplated by said Notice would relate to matters which are privileged and which are not relevant to the subject matter involved in the above entitled action.

"5. The examination contemplated by said Notice would relate to information obtained by the attorneys and agents of the Plaintiff in anticipation of litigation and in preparation for trial, and the mental impressions, conclusions, opinions and legal theories of said attorneys, and no showing has been made that denial of disclosure concerning said matters will unfairly prejudice the defendant Magnolia Petroleum Company or cause said defendant undue hardship or injustice.

"6. The taking of depositions contemplated by said Notice would cause unreasonable annoyance, embarrassment and oppression to the Plaintiff and to the witnesses.

"7. Said Notice seeks to require the attendance of Tom C. Clark, Attorney General of the United States, at

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[2] "All letters, telegrams, and other communications of every kind thereof (together with copies of replies thereto) received by the Department of Justice of the United States (during the period extending from August 1, 1945, to the date of institution of this action) from private individuals, corporations or associations (including parties to this action) relating to methods of operations conducted by defendant, Magnolia Petroleum Company, or any other defendant herein, alone or in association with other defendants (or any number thereof) in or in connection with the production, processing and manufacturing of liquid and gaseous hydrocarbons produced from the Cotton Valley Field of Webster Parish."

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a place remote from his duties at the seat of Federal Government, in Washington, D. C., to submit to examination in a preliminary hearing relating to matters of State and of a confidential nature and not relevant to the subject matter involved in the above entitled case, without any showing as to the possible materiality of the testimony of said Tom C. Clark. That said Notice is therefore unduly oppressive and harassing, is contrary to the public interest, and is against public order.

"8. Said Notice seeks to require the attendance of Malcolm E. Lafargue, United States Attorney, Western District of Louisiana, at a place remote from his office and duties at Shreveport, Louisiana, to submit to examination in a preliminary hearing relating to matters concerning which he has no personal knowledge, without any showing as to the possible materiality of his testimony. That said Notice is therefore unduly oppressive and harassing, is contrary to the public interest, and is against public policy.

"9. That the examination contemplated by said Notice would relate to matters the disclosure of which is prohibited by Department of Justice Order Number 3229, issued pursuant to the authority of Revised Statute 161, 5 U. S. C. 22."

101 (1) The motion to strike might be disposed of by a simple reference to Rule 26(a) of the Rules of Civil Procedure, which allows the taking of depositions before issue joined, before the filing of an answer "by leave of the court" in which the suit is pending. No application was made to or granted by this court for the taking of said depositions. See Application of Wisconsin Alumni Research Foundation (D. C. N. Y. 1945) 4 F. R. D. 264; Deskin vs. Zinker, 6 F. R. D. 615. (Amendment to this rule has been made authorizing taking of depositions without permission of the court before issue joined but the Attorney General has given an opinion that it will not become effective until March (1948).)) However, since the taking of the depositions was stayed by this court and the dates therefor have long since passed, it is thought proper for the guidance of the parties in the future, that the Court should rule upon the issues raised by the motion to strike.

(2) As to the notice to the Attorney General and his assistants, the court may take cognizance of the fact that

his official duties are performed in Washington, D. C. many times the distance of 40 miles, within which a witness may be required to appear, and these witnesses can not be made to respond. Rule 45(d) (2).

As to the United States Attorney, Shreveport is some 37 miles from Marshall, Texas. The rule just cited provides that "a resident of the district in which a deposition is to be taken may be required to attend, etc. A non-resident of the district (in which the deposition is to be taken) may be required to attend * * * within 40 miles of the place of service, or at such other place as may be fixed by the court." In this instance there was no place fixed by the court, for the reason no order for the taking of the deposition of the District Attorney was obtained, but if the right to take it had existed at the time, without this order, then he was within the range which permitted him to be
102 summoned to Marshall, Texas, since he was "a non resident of the district" in which the deposition was to be taken.

(3) The third point of the motion to strike, that the "depositions could not serve the purpose of discovery or as evidence" involves much of what is raised in Nos. 4 and 5.

In response to the motion to strike, Magnolia Petroleum Co., at whose instance the notice to take the depositions was issued, has answered, stating in substance what it expected to prove thereby (a) that the suit of the Government was not filed in good faith, (b) that the United States is only a nominal party and the real plaintiff, not named in the case, is the Premier Oil Refining Company of Texas, "its President, officers, directors and stockholders", (c) that it was filed to pay a political debt of the present national administration, (d) its purpose is to further the final interest of the said corporation, its officers and stockholders, (e) for which reasons the Plaintiff and the Attorney General come into court with "unclean hands", (f) that the purpose is to permit or foster a monopoly on behalf of said corporation in the Cotton Valley field, (g) that plaintiffs are using Woodley Petroleum Co., a subsidiary of the Premier Oil Refining Co., whose officers and stockholders are largely common to those of the former as a nominal defendant to have it enter "a sort of plea of guilty and thereby 'run interference' for the plaintiff and the said Premier Oil Refining Co., to help it achieve a monopoly over distillate from the Cotton Valley Oil field or to insure a future treble damage suit for" it and plaintiff. The three succeeding paragraphs (h), (i) and (j) are largely

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elaborations of the preceding ones; (k) denies that the communications between the Attorney General and the persons named are confidental, (l) that the information sought would enable the Court to understand the "background" of the suit to enable it to balance equities,
103 (m) unless it, Magnolia Petroleum Company is permitted access to the information thus sought, it would be "deprived of its day in court" and be denied due process of law. Paragraphs (n) and (o) are also elaborations of matters covered by preceding numbers.

Rule 26 provides (a) for the taking of oral depositions "for the purpose of discovery or for use as evidence in the action or for both purposes * * * in accordance with these rules * * *;" (b) * * * regarding any matter, not privileged, which is relevant to the subject matter involved * * * in the pending action * * *.

Defendant, Magnolia Petroleum Company (called Magnolia) charges that the suit was not filed in good faith, not because it does not state a cause of action under the Sherman Anti-Trust Act, but because, as this defendant alleges, action was induced by political considerations and to pay a political debt to the Premier Refining Co. (called Premier), not made a party. It would seem sufficient to say that, if the complaint alleges facts, which, under the law, would entitle the plaintiff to relief, and this were substantially proven, the Court could not decline to award judgment even though it might have been inspired in the manner charged. Suppose, on final hearing it should be shown that defendants had violated the anti-trust statute to the extent and in the manner charged and Magnolia was able to show that the Attorney General, his assistants and the United States Attorney had acted at the instance of Premier for the reasons which Magnolia alleges, then this could not thwart a lawful result.

It is the conclusion that the matters charged in paragraphs (a) to (f) inclusive, show that the testimony sought from the Attorney General and the United States Attorney is irrelevant.

104 As to the charge (h) that Woodley Petroleum Company called Woodley) was made party defendant for the purposes stated, when in reality its interest was the same as Premier, if it should be found at the trial that the former is not a bona fide defendant, the bill as to it should be dismissed, and otherwise what has been said as to the preceding paragraphs applies in this instance.

With respect to the charge (i) that for the reasons alleged in the preceding paragraphs the plaintiff (United States)

comes into court with "unclean hands", it is believed that this principle should be confined to matters wherein the party so charged was guilty of some act or acts which were similar to those complained of or attributed to the defendants, or that complainant had committed others of a nature such that good conscience with respect to the subject matter would not permit the complainant to be heard. The answer in no sense charges that these Government officers have participated in acts involving the merits of the matter, which would deprive the Government of its right to insist that the defendants be held to account for their alleged wrongdoing. A simple illustration, it is thought will serve to show the irrelevancy of these charges. Should the National Administration change between now and the trial of this case on the merits, and the new Attorney General should determine to go forward with it, no one could seriously contend that the alleged conduct of the present officers could serve to prevent that course. Then, too, fundamentally, officers of the United States can not bind it either adversely or favorably by action intended to serve their personal ends. Its right to proceed and to have relief according to the facts proven under the complaint can not be diminished by the conduct of its agents.

105 These observations apply equally to paragraphs (j) to (o) inclusive.

From what has been said it follows that the subpoenas *duces tecum* should be recalled and quashed.

MOTIONS FOR MORE DEFINITE STATEMENT OF FACTS

Motions for more definite statement of facts have been filed by a number of defendants. Counsel for one or more of these have asked and will be granted further hearing thereon, and until this has been done, said motions will not be disposed of.

This course will also be pursued as to the exceptions that the complaint fails to state facts upon which relief can be granted. After the motions for more definite statements are out of the way, it will be time to determine whether the bill alleges a cause of action.

Proper decree should be presented.

Thus done and signed in Chambers at New Orleans, Louisiana, on this, the 21 day of January, 1948.

/s/ BEN C. DAWKINS
United States District Judge

(File Endorsement Omitted)

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106 In the United States District Court for the Western District of Louisiana

Shreveport Division

Civil Action No. 2209

UNITED STATES OF AMERICA

vs.

COTTON VALLEY OPERATORS COMMITTEE, THE OHIO OIL CO., *et al.*

For Plaintiff: Tom C. Clark, Atty. Gen., Jno. F. Sonnett, Geo. B. Haddock, W. B. Watson Snyder, and Jas. R. Browning, Spl. Assts. Atty. Gen., Washington, D. C.; Malcolm E. Lafargue, U. S. Atty., Shreveport, Louisiana.

For Defendants: Jno. M. Madison; W. S. Wilkinson; Wilkinson, Lewis & Wilkinson; Jno. T. Gayton, J. R. Goff, Sidney G. Meyers, all of Shreveport, La.; Vernon Roberts, Ada, Oklahoma.

Opinion on Motion to Quash Service—Filed March 15, 1948

DAWKINS, *J.:*

After due consideration of the motion to quash service of process, made by J. J. Frommer on whom it was served for the Cotton Valley Operators' Committee, without finding it necessary to enter into an extended discussion of authorities, this Court is of the opinion that the same should be and it is accordingly overruled. See United Mine Workers vs. Coronado Coal Co., 259 U. S. 344; U. S. vs. Greater N. Y. Live Poultry Chamber of Commerce, 30 Fed. (2d) 939; Dowd vs. United Mine Workers, 235 Fed. 1; Sperry Products, Inc. vs. Assn. American Railroads, 132
107 Fed. (2d) 408; Hecht, Trustees vs. Malley, 265 U. S. 144; and Federal Rules of Civil Procedure, 17(b).

THUS DONE and SIGNED in Chambers at Monroe, Louisiana, on this the 12th day of March, 1948.

/s/ BEN C. DAWKINS
United States District Judge

(File Endorsement Omitted)

108 In the United States District Court for the Western District of Louisiana

Shreveport Division

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UNITED STATES OF AMERICA

vs.

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For Plaintiff: Tom C. Clark, Atty. Gen., Jno. F. Sonnett, Geo. B. Haddock, W. B. Watson Snyder, and Jas. R. Browning, Spl. & Assts. Atty. Genl.; Malcolm E. Lafargue, U. S. Attorney.

For Defendants: Jno. M. Madison; W. S. Wilkinson; Wilkinson, Lewis & Wilkinson; Jno. T. Gayton; J. R. Goff; and Sidney G. Meyers, all of Shreveport, La.; Vernon Roberts, Ada, Okla.

Opinion—Filed April 22, 1948

DAWKINS, *Judge:*

The general nature of the complaint in this case is described in the opinion filed herein on January 21, 1948. We now have for consideration three additional motions, to-wit: (1) By some 20 odd defendants for a more definite statement of facts upon which the demand is founded; (2) By the Ohio Oil Co., for the production of certain documents; and (3) a motion to dismiss.

Taking these motions up in the order named (1) requests further information with respect to Articles 10, 11, 13, 14, 15 and 16 of the complaint.

The request as to paragraph 10 has been voluntarily answered by the complainant to the satisfaction of the defendants.

109 At the oral argument of this motion, after hearing both sides, the request as to Article 11 of the complaint consisting of paragraphs 2, 3 and 5, through 8, were denied from the Bench; while No. 4 had also been answered by complainant to the satisfaction of defendants.

As to Article 13 of the complaint referred to in paragraph 9 of the motion for particulars, the complainant is asked:

> "What was the nature of any agreement (tacit or otherwise) between defendants herein (other than those agreements expressed and contained in the 'Cotton Valley Unitization and Pressure Maintenance

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Agreement') to which it is claimed that this defendant was a party and when and with whom such agreement or agreements made or by what acts or actions was such agreement or conspiracy made manifest?"

Article 13 of the complaint alleges that:

"Said combination and conspiracy (to monopolize and restrain trade in the products of the field, other than what was reinjected for conservation and to increase production) has consisted of a continuing agreement and concert of action among defendants, the substance and terms of which were and are, defendants."

Then follows sub-paragraphs (a) through (d) charging that defendants did agree, while so engaged, "to exclude others" (a) from the business of extracting, processing, and refining various hydrocarbons; (b) from the business of distributing and selling said products; (c) to sell jointly through channels selected by themselves; and (d) to fix uniform prices, terms and conditions of sale, involving over 85 per cent of the "natural flow of liquid and gaseous hydrocarbons produced from the field and not reinjected therein."

The motion in paragraphs 9 through 15, both inclusive, requests that complainant (9) state the "nature of any agreements" with persons other than defendants, after unitization and pressure maintenance agreements, outside of and beyond the signed document approved by the Department of Conservation of the state, which it is claimed defendants entered into, giving the names of the parties thereto besides themselves; (10) "by what means and in what manner * * * defendants undertook to exclude others" from any of such activities; (11) the nature of the business in which the defendants agreed to engage other than extracting and reinjecting the substances into the field,
110 "Where the same was conducted; and at what point or in what manner or by what means could said operations be recognized or identified"; (12) the means and manner used to exclude others from the business of distributing and selling the products taken from the field; (13) nature of the agreement relating to sale and distribution, other than the sale of defendants' own products upon the open market, and with whom made; (14) through what channels did defendants agree to sell; with whom and how did such agreements arise, for how long did each continue, and how were such channels generally selected; (15) what were the prices, terms and conditions agreed upon and in what respects whose prices did not conform to those estab-

lished and available upon the open market, as well as the persons and dates on which said agreements were made, etc.

As to paragraph 9 (Art. 13 of the complaint) the nature of the alleged agreement is described in general terms in said paragraphs 13 (a) through 13 (d) of the complaint, as having been between the large number of defendants charged, sufficiently, it is believed, to apprise them that it was to permit them to control the residue of production remaining after extracting and reinjecting certain elements into the field for the purpose of greater recoveries, including refining, distributing and selling at uniform prices agreed on between them and by excluding all others from any of these activities.

The details as to which of the defendants refined, distributed, shipped, marketed or sold these products and fixed the prices therefor, including the choosing of the channels of operations, to the exclusion of others, whether carried on through third persons or agencies or by the defendants themselves, involved matters of evidence or proof, it is believed, which did not have to be alleged. Defendants may have recourse to interrogatories under No. 33 of the Rules of Federal Procedure for any additional information to which they may be properly entitled.

Paragraph 16 of the motion deals with Article 14
111 of the complaint. This article charges as follows:

"14. The continuing agreements, understandings and concerted action of the defendants set out in paragraphs 11 and 12 of this complaint do not contribute to the conservation of the oil and gas resources of the Field or of the State of Louisiana, or prevent the waste and depletion thereof. Said agreements, understandings and concerted action are not necessary, and do not contribute, to the separation of any of the liquid and gaseous hydrocarbons taken from the Field, nor to the reinjection of a residue of liquid and gaseous hydrocarbons under pressure into the natural reservoirs of the Field. Said agreements, understandings and concerted action are not authorized by Act Number 225 of the Legislature of the State of Louisiana of 1936, Act Number 157 of the Legislature of the State of Louisiana of 1940, nor by Order Number 10-B, dated July 1, 1940, Order Number 10-C, dated January 28, 1941, nor any other order issued by the Commissioner of Conservation of the State of Louisiana."

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Defendants asked "in what respects * * * it is claimed that * * * operations * * * by defendants did not contribute to conservation * * * or were not authorized by statute or order of the Commissioner of Conservation * * * and at what point in the course of such operations did defendants depart from conservation and administrative authority?"

It must be assumed, it would seem, that in the course of the investigation preceding the filing of the complaint, complainant determined the nature of the operation up to the point where permissible acts of conservation ended and the alleged illegal combination and conspiracy in restraint of trade and commerce began. In order to prevail, it will have to make proof of this sufficiently to enable the Court to draw the line and be able to say that "so far your conduct was proper, but beyond this, you began to violate the Sherman Act." The situation presented in this case is unique, in that the complaint as pointed out in the former opinion, set forth the background and history of operations in this field, which it says were proper acts of conservation, having the approval of the state agency, even though the defendants were acting in concert. It then proceeds to charge that certain other activities which were necessary to a realization of the profits or benefits in money from production were illegal. Extraction of the elements
112 from the field production, by refining or otherwise, their transporting and marketing, were not illegal in themselves, but became so only when a point had been reached where the public or those desiring, could participate therein under the conditions which prevailed. Was it at the mouth of the well where the carbonhydrons were withdrawn, at the tanks if storage existed in the field, or at some other point, if the residue had to be transported by pipe lines. It can easily be conceived that a single extraction plant or a refinery existed in the field or vicinity, which was also operated by defendants, who conceived and put into effect the measures of conservation. If so, did any situation arise that compelled them to construct pipe lines or otherwise provide means of transportation for the use of competing refineries or operators, or can it be made to appear that there were already operating, facilities of competitors, who were denied the right to purchase those products at points available to the public? It is true that defendants must be familiar with conditions in the area, and no doubt have in their possession, records of whatever transactions took place; but charges such as those made

in the complaint are quasi criminal, and as defendants' counsel say, if the Government prevails, may be taken advantage of by other private litigants to recover triple damages from these defendants. In fact, the Sherman Act is primarily criminal in its nature, but permits civil remedies, such as are sought here by the Government, to prevent its violation; and the character of the combination and conspiracy should be set forth with sufficient particularity to permit defense, if such exists. Facts should be furnished to show when and where the illegal activity began and by what means competitors were excluded.

If the defendants in this case were stockholders or officers in a single corporation, operating in the Cotton Valley Field, there would appear to be no reason why they could not acquire any part of the production, transport it in the crude state, by pipelines or otherwise, separate its constituent elements in the field, if facilities existed there,
or carry it to refineries operated by themselves and
113 then distribute and sell the finished product, as is
done by most big companies throughout the country. On the other hand, if because of the peculiar conditions, it was necessary that the owners of independent interests in the field should pool the same for the purpose of efficient and profitable recovery, under a system recognized and approved by proper authorities, a point might be reached where a continuation of that pooling of interest might become illegal, if it involved a substantial portion of production, to which the public had access before the necessity for conservation measures arose, and they were denied such rights through refusal of defendants to permit these competitors to participate, after the acts of conservation had been completed. There should be some allegation of fact as to just what was done to bring about a monopoly and the exclusion of competitors other than the legal conclusions that such monopoly existed and caused the exclusions.

Paragraph 16 (a) through 16 (d) of the complaint, under the heading "effects" alleges that the conduct of defendants "excluded other persons and companies from the business" (a) of extracting and processing the hydrocarbons, (b) from selling and marketing, (c) transporting and (d) refining and distributing the same.

Defendants asked that complainant be required to give the names and manner in which other persons were excluded from all the activities covered by these four subdivisions of the complaint.

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Here again, the complaint should give a reasonable outline of the conditions in the field that (1) made the products available to public participation in their commerce, and (2) the available facilities and outlets making competition possible such as refineries, pipelines, etc., which were excluded. In all other respects the motion for particulars or further statement of facts will be denied.

THE MOTION OF OHIO OIL COMPANY TO PRODUCE CERTAIN DOCUMENTS

The issues presented by this motion are the same as were considered in an almost identical motion by the
114 Magnolia Petroleum Co. in the opinion handed down on January 21, 1948. After further consideration the Court is of the view that this motion should likewise be denied for the reasons stated in that opinion.

MOTION TO DISMISS

The motion to dismiss is based on the contention that in pooling their interests in the Cotton Valley field, pursuant to the requirements of the state statute and orders of the Conservation authorities, the defendants became owners in indivision of the production under their control, with the right to make agreements for handling it to their mutual profit or benefit; further, that the nature of the substances produced and the only means for separating the constituent element for marketing made impracticable, though not impossible, a division in kind at any given point prior to realization, without consequent loss or added expense. State decisions, as well as Federal cases are cited to the point, that there is no ownership in these fugacious minerals until brought to the surface and reduced to possession, but only a common right in the surface owners to explore therefor and bring about such possession; from which it follows that the state, under its police power, may regulate the same by requiring, pooling and sharing in production, to prevent economic waste and to insure each surface owner his fair share.

There is no question, that, in Louisiana, the nature of the right of surface owners in minerals is such that the state possesses and in recent years has exercised extensively its power of control and regulation by compelling landowners in many fields, where ownership was in small tracts, to pool their interests and to share in production through one or more wells for an entire block, according to acreage owned. In such situation, up to the point where

the minerals pass into commerce, there exists a joint or common enterprise. Usually, the drilling or marketing is done by one or more lessees, who provide storage or access to pipelines, and the surface owners are paid
115 in accordance with what are commonly called "division orders".

However, where, as alleged here, 85 per cent of the producing area is leased to a number of lessees and they, together with the surface owners, are compelled, by virtue of the said requirements of conservation to pool that percentage of a field of the size of Cotton Valley, a situation is created whereby it is made possible for such a group, if the product happens to be of premium quality, to monopolize the same and to demand high prices, so long as competition can be kept out. And the temptation to do so is increased by the extent of participation of the several interests in those profits; whereas, if competition in the purchase, refining and marketing were allowed to have free play, such premium production might be held to its fair value by those who were willing to take a reasonable profit instead of demanding all the traffic would stand.

In general terms this appears to be what the complaint intends to charge; although as stated in passing upon the motion for particulars or a more definite statement of facts, it has not been made clear just where the line of demarcation between conservation and the alleged monopolistic operations lies. Undoubtedly, if persons, such as are the defendants, according to the complaint, without compulsion for conservation, voluntarily entered into an agreement to pool 85 per cent of production in a field such as this, and to exclude from participation all others, through all steps to ultimate realization of the profits or benefits, which are the controlling reasons for all business enterprises, it could hardly be contended, that such a course was not within the purview of the anti-trust laws. If this were permissible as to one field, no reason can be seen why it could not be extended to others, and thus bring about a condition similar to that which precipitated dissolution of the original Standard Oil Company years ago.

It is believed that when complainant shall have
116 complied with the ruling for a definite statement of the cause of action, the issues of fact and law will appear sufficiently to warrant a trial on the merits.

The motion to dismiss will therefore be overruled.

Proper decree should be presented.

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Thus Done and Signed in Chambers at Monroe, Louisiana, on the 21 day of April, 1948.

(Signed) BEN C. DAWKINS
United States District Judge

(File Endorsement Omitted)

117 In United States District Court

(Title Omitted)

Order Denying Motion of Ohio Oil Company—Filed June 1, 1948

The Defendant Ohio Oil Company having moved this Court for an order requiring the Plaintiff to produce certain documents; the Plaintiff and various of the proposed deponents having moved this Court to vacate and strike the Defendant Magnolia Petroleum Company's Notice of Intention to Take Oral Depositions, and to quash and vacate subpoenae *duces tecum* issued pursuant thereto; and briefs having been submitted and oral argument had upon said motions;

THEREFORE, for the reasons stated in the written opinions handed down by me herein on the 21st day of January, 1948, and on the 21st day of April, 1948, and sufficient cause to me appearing, it is:

ORDERED that the motion of the Defendant Ohio Oil Company for an order requiring the Plaintiff to produce documents is denied, and that the Defendant Magnolia Petroleum Company's Notice of Intention to Take Oral Depositions and the subpoenae *duces tecum* issued pursuant thereto are vacated.

BEN C. DAWKINS
United States District Judge

Dated this 27th day of May, 1948.

(File Endorsement Omitted)

118 In United States District Court

(Title Omitted)

Plaintiff's Second More Definite Statement—
Filed June 10, 1948

Pursuant to the order of the court entered herein on the 1st day of June 1948, the plaintiff submits the following more definite statement.

I

IDENTIFICATION OF THAT PART OF THE JOINT ACTIVITY OF DEFENDANTS WHICH CONSTITUTES THE VIOLATION OF THE SHERMAN ACT CHARGED IN THE COMPLAINT HEREIN

A. *Joint Activity in Extraction, Processing and Refining*

Beginning in the fall of 1938, the defendants conducted joint experiments to determine the feasibility of separating certain of the liquid and gaseous hydrocarbons from the natural flow from the Cotton Valley Field, and returning the residue to the Field under pressure. The defendants jointly constructed and operated an experimental re-cycling in the Field was feasible. This joint program was authorized by a special order issued by the Louisiana Commissioner of Conservation on December 13, 1938.

119 In or about June 1940 the defendants entered into an agreement for the purpose of establishing re-cycling operations in the Field upon a full scale permanent basis. To accomplish this purpose the agreement provided for the unitization of liquid and gaseous hydrocarbons within the underground reservoirs of the Field and the pooling of the lands containing these substances, the production of these substances by a joint agency known as the Operator's Committee, the construction and operation by the joint agency of a re-cycling plant, and the apportionment of the substances produced but not reinjected into the Field to the several defendants. Defendants completed the joint construction of a permanent re-cycling plant in the month of May 1941, and placed it in operation. This joint activity was authorized by the Commissioner of Conservation of the State of Louisiana in Orders Numbers 10B and 10C dated July 1, 1940, and January 28, 1941, respectively.

The joint re-cycling experiments conducted by the defendants at the Cotton Valley Field, the agreement to establish re-cycling operations in the Field upon a full scale permanent basis, the joint construction of a re-cycling plant at the Field, and the joint operation of that plant to separate a part or all of the liquid or gaseous hydrocarbons from

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the natural flow of the Field and to reinject the residue of the natural flow into the underground reservoirs of the Field under pressure, are not a part of the violation of the Sherman Act charged in the complaint herein.

At or shortly after the commencement or re-cycling operations in the month of May 1941, the defendants agreed to and did jointly engage in the business of extracting, processing and refining various separate hydrocarbons and hydrocarbon products from that portion of the natural flow of the Field which defendants had produced from the Field and not reinjected therein. This joint activity, together with joint activity in transportation, distribution and sale, constitutes the violation of the Sherman Act charged in the complaint herein. This joint activity has included the hereinafter described joint extraction, processing and refining operations, none of which was necessary to the separation of a part or all of the liquid and gaseous hydrocarbons from the natural flow of the Field nor to the reinjection of the residue of the natural flow into the underground reservoirs of the Field under pressure. Plaintiff avers that joint activity of defendants which is not a part of the violation of the Sherman Act charged in the complaint herein ended with the joint separation by defendants of a part of the liquid and gaseous hydrocarbons from the natural flow of the Field and the reinjection of the residue of the natural flow into the underground reservoirs of the Field under pressure. Plaintiff avers that the illegal joint extraction, processing and refining activity of defendants which is a part of the violation of the Sherman Act charged in the complaint herein began with and includes the following joint extraction processing and refining operations by means of which defendants jointly produced separate hydrocarbons and hydrocarbon products from that portion of the natural flow of the Field which defendants had produced from the Field and not reinjected therein:

120

1. At various times during the period May 1, 1941, to April 1, 1946, the exact dates being unknown to plaintiff, the defendants agreed to and did jointly construct and operate facilities for the production of the following separate hydrocarbons and hydrocarbon products from the portion of the natural flow of the Field which defendants had produced from the Field and not reinjected therein: butane mixture, iso-butane, normal butane, iso-pentane, normal pentane concentrate, propane, and propane-butane mixture. At the

date of the filing of the complaint herein defendants were jointly producing normal-butane iso-butane, propane, and propane-butane mixture.

2. In or about September 1942, the defendants agreed to, and beginning in or about May 1943, did, jointly produce toluene concentrate from the portion of the natural flow of the Field which defendants had produced from the Field and not reinjected therein.

121 The defendants undertook the construction of facilities for the production of toluene concentrate and produced this product at the request or with the encouragement of employees of the United States charged with securing adequate supplies of toluene for use in the prosecution of the late war. Plaintiff does not allege that defendants acted from improper motives in engaging in the joint production of toluene concentrate and in excluding others from this business, but does aver that said joint activity was violative of the Sherman Act and prays the court to enjoin its continuance or repetition. Defendants continued the joint production of toluene concentrate to in or about September 1945.

3. In or about September 1945, the defendants agreed to, and beginning in or about November 1945, did, jointly produce the following hydrocarbon products from the portion of the natural flow of the Field which defendants had produced from the Field and not reinjected therein: gasoline (including unleaded, regular, and premium), kerosene, fuel oil, residue, and kerosene-residue mixture. Defendants continued the joint production of gasoline, kerosene, fuel oil, residue, and kerosene-residue mixture to the date of the filing of the complaint herein.

B. *Joint Activity in Distribution and Sale*

Beginning in or about June 1940, and continuing to the date of the filing of the complaint herein, defendants agreed upon fixed and uniform prices and terms and conditions of sale for the portion of the natural flow of the Field which defendants had produced from the Field and not reinjected therein, and for each of the separate hydrocarbons and hydrocarbon products jointly produced by defendants from said portion of said production as hereinbefore described. During said period defendants agreed to and did jointly distribute and sell said hydrocarbons, at the fixed and uniform prices and terms and conditions agreed upon, through

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channels of distribution jointly selected by the defendants.

122 Plaintiff avers that all of the joint activity of defendants in the distribution and sale of said hydrocarbons during the period covered by the complaint herein is a part of the violation of the Sherman Act charged in the complaint herein, except the joint activity of defendants in the distribution and sale of gas pursuant to Article II of the Cotton Valley Unitization and Pressure Maintenance Agreement. Plaintiff avers that the illegal joint activity of defendants in the distribution and sale of said hydrocarbons began with the commencement in or about June 1940, of defendants' joint activity in distribution and sale of hydrocarbons taken from the underground reservoirs of the Field and not reinjected therein, other than gas distributed and sold by defendants as such.

II

OUTLINE OF CONDITIONS AT THE FIELD WHICH MADE PRODUCTS OF THE FIELD AVAILABLE TO PUBLIC PARTICIPATION IN THEIR COMMERCE, AND IDENTIFICATION OF AVAILABLE FACILITIES AND OUTLETS MAKING COMPETITION POSSIBLE WHICH WERE EXCLUDED BY DEFENDANTS' JOINT ACTIVITY

A. *Extraction, Processing and Refining*

At all times during the period covered by the complaint herein adequate facilities, other than those jointly constructed and operated by the defendants, have existed for the extraction, processing and refining of separate hydrocarbons and hydrocarbon products from the portion of the natural flow of the Field which defendants produced from the Field and did not reinject therein. At all times during the period covered by the complaint herein adequate facilities, other than those jointly constructed and operated by defendants, have existed for the transportation of said portion of the production of the Field to said facilities for extraction, processing and refining. At all times during the period covered by the complaint herein many of the operators of said facilities have been willing and able to engage in the business of extracting, processing and refining said hydrocarbons from said portion of the production of the Field.

123 Three refining installations other than those jointly constructed and operated by defendants, are and have been available immediately adjacent to the Field. These facilities are owned by Premier Oil Refining Company, Longview, Texas; the Coast Oil Company, Shreve-

port, Louisiana; and by the United States. The facilities of the Premier Oil Company are capable of utilizing approximately 5,500 barrels of the 10,000-barrel daily production of the Field. The facilities of the Coast Oil Company are capable of utilizing approximately 2,500 barrels of the daily production of the Field. The facilities owned by the United States are capable of utilizing in excess of 3,000 barrels of the daily production of the Field. Each of these above described facilities adjacent to the Field is equipped with adequate pipe line connections to the Field, and with adequate storage loading and similar auxiliary equipment. By the illegal joint activity of defendants described in Part I A hereof defendants have excluded the Premier Oil Refining Company and the Coast Oil Company from the business of extracting, processing and refining separate hydrocarbons and hydrocarbon products from the portion of the natural flow of the Field which the defendants had produced from the field and not reinjected therein, although said companies were willing and able to engage in said business. By said joint activity defendants have precluded the utilization of the facilities owned by the United States by a purchaser of lessee thereof in the business of extracting, processing, and refining separate hydrocarbons and hydrocarbon products from said portion of the production of the Field.

During some or all of the period covered by the complaint herein, adequate means, other than facilities jointly constructed by defendants, have existed for the movement to extraction, processing and refining facilities other than those adjacent to the Field of the portion of the natural flow of the Field produced from the Field and not reinjected therein. The Esso-Standard Oil Company, formerly the Standard Oil Company of Louisiana and the Standard Oil Company of New Jersey, has owned gathering lines in the Field connected with the pipe line system of the Interstate Pipe Line Company of Tulsa, Oklahoma. This
124 pipe line system has been and is available as a common carrier connected to other pipe line systems for shipment of the production of the Field to virtually all of the states of the United States, to the Dominion of Canada, and to Gulf Coast tanker connections to foreign refineries and terminals. Pipe line connections have been available from the Field to the common carrier pipe line systems of the Atlas Oil and Refining Corporation and the Arkansas Pipe Line Corporation through which the production of the Field could reach refinery and terminal

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points in Louisiana and Arkansas. Pipe line connections have been available from the Field to the pipe line system of the Magnolia Pipe Line Co. through which the production of the Field could reach refinery and terminal facilities in Arkansas, Texas and Oklahoma and, through connecting common carrier pipe line systems, points in virtually all of the states of the United States, in the Dominion of Canada and through Gulf Coast tanker terminals, to the various foreign refineries and terminals. The line of the Louisiana and Arkansas Railroad and public automobile highways at and adjacent to the Field have and do provide a means for the movement of the production of the Field by tank car and tank truck to refineries and terminal points throughout the United States, or to barge, tanker, or pipe line facilities connected to said refineries and terminal points.

During the period covered by the complaint herein various persons engaged in the business of extracting, processing and refining separate hydrocarbons and hydrocarbon products in facilities not located adjacent to the Field, have been willing and, by reason of the availability of the above described facilities for the movement of hydrocarbons from the Field, have been able to engage in the business of extracting, processing and refining separate hydrocarbons and hydrocarbon products from the portion of the natural flow of the Field produced from the Field and not reinjected therein. By the illegal joint activity of defendants described in Part I A hereof, defendants have excluded said persons from said business. Among the persons so excluded were: Esso-Standard Oil Company, New York, New York, formerly the Standard Oil Company of Louisiana and Standard Oil Company of New Jersey; Stanolind Oil and Gas Company, Tulsa, Oklahoma, Arkansas Fuel Oil Company, Shreveport, Louisiana; Magnolia Petroleum Company, Dallas, Texas; Gulf Oil Corporation, Pittsburgh, Pennsylvania; and others whose names are not yet known to plaintiff.

By said illegal joint activity defendants have also excluded from said business all of the persons to whom said portion of said production would have been available by reason of the existence of the above described facilities for the movement of the hydrocarbons from the Field, and which persons, but for the illegal joint activity of defendants, might therefore have engaged in the business of extracting, processing and refining separate hydrocarbons and hydrocarbon products from the portion of the natural

flow of the Field which defendants produced from the Field and did not reinject therein. Because of the premium quality of the production of said Field, potential purchasers of said production were and are numerous.

B. *Distribution and Sale*

As averred in Part II A hereof, at all times during the period covered by the complaint herein, adequate facilities, other than those jointly constructed and operated by defendants, have existed for the transportation to available markets of the portion of the natural flow of the Field jointly produced by defendants from the field and not reinjected therein, and of the various separate hydrocarbons and hydrocarbon products jointly extracted, processed and refined by defendants from said portion of said production. At all times during the period covered by
126 the complaint herein various persons engaged in the business of distributing and selling hydrocarbons and hydrocarbon products have been willing and able to purchase and distribute and sell the portion of the natural flow of the Field jointly produced from the Field by defendants and not reinjected therein and the various separate hydrocarbons and hydrocarbon products jointly extracted, processes and refined from said portion of said production by defendants. By the illegal joint activity of defendants alleged in Part I B hereof, defendants have excluded said persons from said business. Among the persons so excluded were: Esso-Standard Oil Company, New York, New York, formerly Standard Oil Company of Louisiana and Standard Oil Company of New Jersey; Premier Oil Refining Company, Longview, Texas; Coast Oil Company, Shreveport, Louisiana; Lion Oil and Refining Company, El Dorado, Arkansas; Placid Oil Company, Dallas, Texas; Magnolia Petroleum Company, Dallas, Texas; Shoreline Oil and Gas Company, Tulsa, Oklahoma; American Mineral Spirits Company, Chicago, Illinois; and others whose names are not yet known to plaintiff.

By said illegal joint activity defendants have excluded from the business of distributing and selling the portion of the natural flow of the Field which defendants produced from the Field and did not reinject therein, and the various separate hydrocarbons and hydrocarbon products jointly extracted, processes and refined from said portion of said production by defendants, each of the several defendants herein, who, but for the illegal joint activity of defendants, would have engaged in said business. By said illegal joint activity defendants have also excluded from

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said business all persons to whom said hydrocarbons would have been available by reason of the existence of the facilities described in Part II A hereof for the movement of said hydrocarbons from the Field, and which persons, but for the illegal joint activity of defendants, might therefore have engaged in the business of purchasing and distributing and selling said hydrocarbons. Because of the
127 premium quality of said hydrocarbons, potential purchasers, distributors and sellers of said hydrocarbons were and are numerous.

C. *Joint Activity in Transportation*

Facilities available for the movement to available markets of the portion of the natural flow of the Field jointly produced by defendants from the Field and not reinjected therein, and of the various separate hydrocarbons and hydrocarbon products jointly extracted, processed and refined by defendants from said portion of said production, are described in Section II A hereof. The illegal joint activity of defendants in extracting, processing and refining and in distribution and sale which are a part of the violation of the Sherman Act charged in the complaint herein, as described in Parts I A and I B hereof, and the joint construction and operation by defendants of a pipeline from the Field to Sarepta, Louisiana, beginning in or about October, 1945, resulted in the use of a limited part of said available transportation facilities, and the exclusion of the operators of the balance of said facilities from the opportunity to engage in the business of transporting the products of the Field. The particular transportation facilities utilized (other than the pipeline from the Field to Sarepta, Louisiana, jointly constructed and operated by defendants), and those excluded, are not yet known to plaintiff.

JAMES R. BROWNING
WILLARD R. MEMLER
Attorneys for the United States

MALCOLM E. LAFARGUE
United States Attorney

(File Endorsement Omitted)

128 In United States District Court

(Title Omitted)

Answer of Defendant Magnolia Petroleum Company—Filed August 9, 1948

Now comes defendant MAGNOLIA PETROLEUM COMPANY, subject to its motion to strike, without waiving the same

but still insisting thereon, and files this as its answer in the above-entitled and-numbered action, in answer to plaintiff's complaint, as amended by Plaintiff's More Definite Statement and by Plaintiff's Second More Definite Statement, and says:

• • • • •

(NOTE: Complete Answer of Magnolia appears copied in full in accordance with Designation of Magnolia—on Page 361)

(File Endorsement Omitted)

129 In United States District Court

(Title Omitted)

Answer of Hunt Oil Company, Roy Lee, Trustee of Hassie Hunt Trust, and H. L. Hunt—Filed August 13, 1948

To the complaint herein, as amended by Plaintiff's More Definite Statement and Second More Definite Statement, Defendants Hunt Oil Company, Roy Lee, Trustee of Hassie Hunt Trust, and H. L. Hunt answer as follows:

• • • • •

(File Endorsement Omitted)

130 In United States District Court

(Title Omitted)

Answer of Defendant Stanolind Oil and Gas Company—Filed August 13, 1948

Stanolind Oil and Gas Company, one of the defendants in the above entitled and numbered action, subject to its pending motion to strike plaintiff's Second More Definite Statement, in answer to plaintiff's complaint, as amended by plaintiff's More Definite Statement and by plaintiff's Second More Definite Statement, says:

• • • • •

(File Endorsement Omitted)

131 In United States District Court

(Title Omitted)

Answer of Defendant Fohs Oil Company—Filed August 13, 1948

Fohs Oil Company, one of the defendants in the above entitled and numbered action, subject to its pending motion

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to strike plaintiffs Second More Definite Statement, in answer to plaintiff's complaint, as amended by plaintiff's More Definite Statement and by plaintiff's Second More Definite Statement, says:

* * * * *

(File Endorsement Omitted)

132 In United States District Court

(Title Omitted)

Motion for Production of Documents Under Rule 34—Filed August 24, 1948

The plaintiff, the United States of America, moves the Court for an order requiring each of the defendants: The Ohio Oil Company; Hunt Oil Co.; Magnolia Petroleum Company; Union Producing Company; Fohs Oil Company; Bodcaw Cotton Valley Co., Inc.: Grant Oil Co.; Midstates Oil Corp.; North American Oil Consolidated; Root Petroleum Co.; Woodley Petroleum Corp.; Jabco, Inc.; Standolind Oil and Gas Co.; Sunray Oil Corp.; Welori Lumber Corp.; H. L. Hunt; Roy Lee, Trustee of Hassie Hunt; A. G. Oliphant; Allene Oliphant; Charles W. Oliphant; A. J. Hodges; M. H. Marr; Sydney G. Myers; Mrs. Nellie G. Myers; H. W. Perritt; W. G. Ray; Daniel W. Stewart; E. L. Stewart; Frank B. Treat; G. H. Vaughn; E. U. Whitwell; W. C. Woolf; W. A. Delaney, Jr.; to produce and to permit plaintiff to inspect and to copy each of the following documents which are in the possession, custody or control of the defendants:

I

All original letters, telegrams, memoranda or other writings, sent or received by defendant, for the period January 1, 1938, to June 16, 1947, relative to:

(a) the formation of the voluntary unincorporated association of owners and/or owners' representatives known as the Cotton Valley Operators' Committee;

133 (b) the drafting and execution of the Cotton Valley Unitization and Pressure Maintenance Agreement;

(c) the approval of the Cotton Valley Unitization and Pressure Maintenance Agreement (and orders thereunder) by the Commissioner of Conservation of the State of Louisiana and the Chairman of the State of Louisiana State Mineral Board, including among other things, the approval or rejection of rights,

powers, authority and operations of CVOC pursuant to the execution and/or approval of said agreement.

II

All original letters, telegrams, proposed and/or executed contracts, memoranda or other writings, sent or received by defendant for the period of January 1, 1938, to June 16, 1947, relative to:

(a) the production and allocation thereof of liquid hydrocarbons and gaseous hydrocarbons in the Cotton Valley Field;

(b) The processing and/or refining of various separate hydrocarbons and/or hydrocarbon products by CVOC and/or others in the Cotton Valley Field;

(c) the sale or consignment of any hydrocarbons produced or processed in the Cotton Valley Field.

III

All tender tickets, monthly reports, letters, memoranda, telegrams or other writings, sent or received by defendant for the period January 1, 1938, to June 16, 1947, relative to:

(a) the tender to and transportation of liquid and/or gaseous hydrocarbons by pipe lines or other carriers.

IV

All letters, telegrams, memoranda, proposed and/or executed contracts or other writings, sent or received by
134 defendant, for the period January 1, 1938, to June 16, 1947, relative to:

(a) the purchase, sale, lease or construction of the following plants or facilities in the Cotton Valley Field:

1. Toluene Plant
2. Processing or refining plant
3. Pipe lines or pipeline facilities
4. Loading facilities
5. Storage facilities

V

All letters, memoranda, telegrams, or other writings, sent or received by defendant, relative to the cancellation of division orders, purchase agreements or contracts with persons or corporations for the purchase of liquid hydrocarbons from the Cotton Valley Field for the period January 1, 1938, to June 16, 1947.

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Copies of any of the records, correspondence, books, or other documents described in this motion should be produced only where the originals are not in the possession or control of the defendants.

Defendants have the possession, custody or control of each of the foregoing documents. Each of them constitutes or contains evidence relevant and material to a matter involved in this action, as is more fully shown in Exhibit A hereto attached.

Dated: August 20, 1948

/s/ DANIEL B. BRITT
Special Assistant to the Attorney General

/s/ WILLARD R. MEMLER
Willard R. Memler
Special Attorney

135 *Exhibit "A" to Motion*

In the District Court of the United States
For the Western District of Louisiana

Shreveport Division

Civil Action No. 2209

UNITED STATES OF AMERICA,
PLAINTIFF

v.

COTTON VALLEY OPERATORS' COMMITTEE, *et al.*,
DEFENDANTS

CITY OF WASHINGTON }
DISTRICT OF COLUMBIA } ss.:

W. B. WATSON SNYDER, being first duly sworn, says: That I am an attorney in the United States Department of Justice and am engaged in the preparation of this case on behalf of the United States, the plaintiff herein;

That the documents, records and correspondence described in the motion to which this affidavit is attached are of such a nature, being writings containing data relating intimately to the business of each of the respective defendants or its predecessors, subsidiaries, or affiliates, and in all cases prepared, signed, or received by one of them, that they would naturally be in the possession of each of the respective defendants or subject to its control if they are in existence at this time;

That the complaint in this action alleges that the defendants named in the motion to which this affidavit is attached has been engaged in an unlawful combination and conspiracy in restraint of trade and commerce among the several states of the United States in liquid and gaseous hydrocarbons produced in the Cotton Valley Field and has been and is now a party to contracts, agreements and
136 understandings in restraint of such trade and commerce;

That the complaint charges that the defendants unlawfully agreed to engage jointly in and to exclude others from the business of extracting, processing and refining hydrocarbon products in the Cotton Valley Field; that the defendants unlawfully agreed to engage jointly in and to exclude others from the business of distributing and selling said hydrocarbon products; that the defendants agreed jointly to sell said products through channels of distribution selected by them; and that the defendants agreed upon fixed and uniform prices and terms and conditions of sale for said hydrocarbon products;

That each of the documents mentioned and described in the motion to which this affidavit is attached is relevant to one or more of the issues in this action;

That Item I of the motion comprehends documentary materials and data which will reveal the organization of the defendant Cotton Valley Operators' Committee, and records possessed by each defendant relating to the activities, powers, authority and operations of the Cotton Valley Operators' Committee, all of which are relevant to the issues of this action;

That Item II comprehends documentary materials and data which will reveal records relating to the production, allocation, processing, refining, sale and consignment of hydrocarbons produced in the Cotton Valley Field, all of which are relevant to the issues of this action;

That Item III is a request for documents pertaining to tender and transportation of hydrocarbons and/or hydrocarbon products by pipe lines and other carriers, all of which are relevant to the issues in this action;

That Item IV requests documentary material which relates to the construction, lease or purchase of facilities in the Cotton Valley Field which the plaintiff contends were part of the plan which brought about the combination and conspiracy charged;

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137 That Item V requests documentary material which will show the exclusion of persons or companies as charged by the complaint in this action.

/s/ W. B. Watson Snyder
W. B. Watson Snyder

Subscribed and sworn to before me
this 20th day of August, 1948.
/s/ Walter W. Dosh
Notary Public
My commission expires:
December 15, 1950

(File Endorsement Omitted)

138 In United States District Court

(Title Omitted)

Motion to Vacate and Set Aside Order of April 21, 1948—Filed August 26, 1948

Defendant The Ohio Oil Company moves the Court to vacate and set aside the order of date April 21, 1948, denying this defendant's motion for production of documents under Rule 34, for the reason that said motion for production of documents was confused with application to take oral depositions and for writ of subpoena *duces tecum* filed by Magnolia Petroleum Company; and

Finally, that this defendant's motion for production of documents be granted.

(Sgd.) A. M. Gee
A. M. Gee, 539 South Main Street
Findlay, Ohio.
(Sgd.) C. F. Currier
C. F. Currier, Commercial National
Bank Building, Shreveport, Louisiana.
(Sgd.) J. P. D'Artois
J. P. D'Artois, Commercial National
Bank Building, Shreveport, Louisiana.
(Sgd.) Leon O'Quin
Leon O'Quin, 424 First National Bank
Building, Shreveport, Louisiana.
(Sgd.) Arthur O'Quin
Arthur O'Quin, 424 First National Bank
Building, Shreveport, Louisiana.
Attorneys for the Ohio Oil Company.

(File Endorsement Omitted)

139 In United States District Court

(Title Omitted)

Motion for Production of Documents Under Rule 34—Filed September 10, 1948

The defendant Magnolia Petroleum Company moves the Court for an order requiring plaintiff to produce and permit defendant Magnolia Petroleum Company to inspect and copy each of the following documents which are in the possession, custody or control of plaintiff:

I

All original letters, copies, photostats, lists, abstracts, telegrams, memoranda or other writings taken from the files of CVOC or Woodley Petroleum Corporation, sent or received by any defendant, for the period January 1, 1938 to June 16, 1947, relative to:

(a) the formation of the voluntary unincorporated association of owners and/or owners' representatives known as the Cotton Valley Operators' Committee;

(b) the drafting and execution of the Cotton Valley Unitization and Pressure Maintenance Agreement;

(c) the approval of the Cotton Valley Unitization and Pressure Maintenance Agreement (and orders there-
140 under) by the Commissioner of Conservation of the State of Louisiana and the Chairman of the State of Louisiana State Mineral Board, including, among other things, the approval or rejection of rights, powers, authority and operations of CVOC pursuant to the execution and/or approval of said agreement.

II

All original letters, copies, photostats, lists, abstracts, telegrams, proposed and/or executed contracts, memoranda or other writings taken from the files of CVOC or Woodley Petroleum Corporation, sent or received by any defendant for the period of January 1, 1938 to June 16, 1947, relative to:

(a) the production and allocation thereof of liquid hydrocarbons and gaseous hydrocarbons in the Cotton Valley Field;

(b) the processing and/or refining of various separate hydrocarbons and/or hydrocarbon products by CVOC and/or others in the Cotton Valley Field;

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(c) the sale or consignment of any hydrocarbons produced or processed in the Cotton Valley Field.

III

All tender tickets, monthly reports, letters, copies, photostats, lists, abstracts, telegrams, memoranda or other writings taken from the files of CVOC or Woodley Petroleum Corporation, sent or received by any defendant, for the period January 1, 1938 to June 16, 1947, relative to:

(a) the tender to and transportation of liquid and/or gaseous hydrocarbons by pipe lines or other carriers.

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IV

All letters, copies, photostats, lists, abstracts, telegrams, memoranda, proposed and/or executed contracts or other writings taken from the files of CVOC or Woodley Petroleum Corporation, sent or received by any defendant for the period of January 1, 1938 to June 16, 1947, relative to:

(a) the purchase, sale, lease or construction of the following plants or facilities in the Cotton Valley Field:

1. Toluene Plant
2. Processing or refining plant
3. Pipe Lines or pipeline facilities
4. Loading facilities
5. Storage facilities

V

All letters, copies, photostats, lists, abstracts, telegrams, memoranda or other writings taken from the files of CVOC or Woodley Petroleum Corporation, sent or received by any defendant, relative to the cancellation of division orders, purchase agreements or contracts with persons or corporations for the purchase of liquid hydrocarbons from the Cotton Valley Field for the period January 1, 1938 to June 16, 1947.

Plaintiff has the possession, custody or control of each of the foregoing documents. Each of them constitutes or contains evidence relevant and material to a matter involved in this action, as is more fully shown in Exhibit A hereto attached.

Dated: September 9, 1948

DIXON CARROLL
Ricou-Brewster Bldg.
Shreveport 95, Louisiana

WALLACE HAWKINS
EARL A. BROWN
P. O. Box 900
2311 Magnolia Bldg.
Dallas 1, Texas

/s/ CHAS. B. WALLACE
Chas. B. Wallace
P. O. Box 900
2311 Magnolia Bldg.
Dallas 1, Texas
Attorney for Defendant
Magnolia Petroleum Company

142 *Exhibit "A" to Motion*

In the District Court of the United States
For the Western District of Louisiana

Shreveport Division

UNITED STATES OF AMERICA,
PLAINTIFF
v.
COTTON VALLEY OPERATORS' COMMITTEE *et al.*,
DEFENDANTS

Civil Action No. 2209

State of Texas }
County of Dallas } ss.:

CHAS. B. WALLACE, being first duly sworn, says: That I am an attorney for Magnolia Petroleum Company, a defendant in the above-named and-entitled cause, and I am engaged in the preparation of this case on behalf of defendant Magnolia Petroleum Company;

Your affiant was informed on or about February 18, 1946 by Mr. Edwin W. Smith, Jr., a member of the Federal Bureau of Investigation investigating this case, that his department had spent and was spending several weeks or months investigating the files of the CVOC in Cotton Valley, Louisiana; that in March of 1946 your affiant was informed by Mr. J. R. Butler, General Manager of CVOC in Cotton Valley, Louisiana, that the FBI was making such

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investigation and was making notes of its files and correspondence, taking copies thereof; that on or about March 7, 1946 your affiant was informed by Mr. M. E. Sandlin, Vice-President of Woodley Petroleum Company that Woodley Petroleum Company had turned its files over to the FBI for their examination; that in a previous hearing on various motions in this cause Mr. Jack Blalock, while appearing as attorney of record for Woodley Petroleum Company, admitted in open court that, on behalf of Premier Oil Refining Company of Texas, he had filed the complaint on which this case was based; your affiant, therefore, is informed and verily believes that the FBI has taken various papers, originals, copies, photostats, lists, abstracts, telegrams, memoranda or other writings from the files of not only CVOC but has been furnished the same instruments from the files of Woodley Petroleum Company at the instance of Woodley Petroleum Company's attorneys and officials who have been or were then or are now some of the officials, policy-making officials and legal counsel for not only Woodley Petroleum Company but Premier Oil Refining Company of Texas; that defendant Woodley Petroleum Company is alleged to be a fellow-conspirator of this defendant and, though defendant Magnolia Petroleum Company has examined its attorneys, officials and employees and though defendant Magnolia Petroleum Company has examined its files, it can find no instrument or communication of any kind or character which would indicate any conspiracy, combination, or restraint of trade of which it would be guilty as charged in this proceedings, and that to properly prepare its case for trial it must discover what evidence taken from the files of Woodley Petroleum Company and what evidence taken from the files of CVOC is relied upon by the Government or would or might likely be introduced by the Government as a declaration or act by an alleged co-conspirator which could possibly be binding upon this defendant;

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Your affiant further shows that it does not have custody of either the records of CVOC or the records of Woodley Petroleum Company, and further your affiant shows that no list of the instruments inspected, copied, seized or abstracted by the FBI in either the files of CVOC or the files of Woodley Petroleum Company is available to it;

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Affiant further charges information and belief that all of the instruments requested in plaintiff's Motion for

Production of Documents Under Rule 34 are already in its possession and that the assembling, production and custody of such records in such order would be an onerous, burdensome and expensive task to it and would serve no useful purpose because of the previous investigation of the FBI and the furnishing of complete histories of the CVOC and the complete and detailed facts relative to its operation by Woodley Petroleum Company, a so-called defendant herein, which can be established by the production of said instruments by plaintiff;

Affiant further shows to the Court that such request is too general and does not specify exact and particular items which this defendant could make a search for;

That if the Court should grant plaintiff's Motion for Production of Documents Under Rule 34 it should only be required to produce those which plaintiff does not already have and that the work, effort and expense of defendants could in all probability be reduced both as to time and amount by ninety-five per cent if the Court would require of the plaintiff the same discovery which plaintiff would seek of these defendants by ordering plaintiff to first compile, assemble and deliver to defendants a list of the items which plaintiff already has, and in this connection this defendant shows that defendants would in all probability have to assemble from their files scattered over many states at least many thousands of items which would be duplications as between defendants and which, after such tedious and expensive job of assembling and preparation, the Government would not need because practically all of such items are already in the Government's possession;

145 Your affiant on information and belief shows that the FBI made a lengthy and complete investigation of this case and, while your affiant is informed that this investigation showed no actual violation of any of the Federal antitrust laws, nevertheless, your affiant is further informed that the FBI examined all relevant instruments before this suit was ever filed.

Wherefore, premises considered, your affiant, on behalf of the defendant Magnolia Petroleum Company, in the event that this Honorable Court should grant plaintiff's Motion for Production of Documents, prays the Court:

(a) To limit such documents to those documents which plaintiff does not already have;

(b) To limit such documents to documents not involving confidential communications between this defendant and its attorneys;

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(c) That such documents be not impounded, for the impounding thereof would make virtually impossible the preparation of this defendant's case for trial and the introduction of testimony;
(d) That the Court require the Government to inspect and copy any records of defendant required to be produced in Dallas, Dallas County, Texas, its home office;
(e) That the Court allow this defendant the continued custody and control of its corporate records, if any, which it may be required to produce, and that it be allowed to have an official, attorney or employee present at all times during the course of any such inspection or copying;
(f) That as a condition to the granting of plaintiff's Motion for Production of Documents the Government be required to make the same discovery here requested as it there seeks; and

146 (g) That, independent of the conditional discovery and production requested in (f) above, the Court grant this defendant's Motion for Production of Documents.

147 Under Rule 34.

/s/ CHAS. B. WALLACE
Chas. B. Wallace
Attorney for Defendant
Magnolia Petroleum Company

Duly sworn to by Chas. B. Wallace.
Jurat omitted in printing. (All in italics.)

(File Endorsement Omitted)

148 In United States District Court

List of Documents—Filed Sept. 17, 1948

Document Date	*Description of Document*
September 6, 1945	Coast Oil Company to J. R. Butler of CVOC—3 pages—unsigned typed copy
September 11, 1945	Coast Oil Company to J. R. Butler of CVOC—5 pages—unsigned typed copy
October 1, 1945	Coast Oil Company to J. R. Butler of CVOC—2 pages—unsigned typed copy

Document Date	*Description of Document*
October 26, 1945	Unsigned agreement between Coast Oil Company and unnamed lessor and unnamed lessee—5 pages—typed copy (Attachment to letter of October 1, 1945 above)
June 17, 1941	Premier Oil Refining Company of Texas to Magnolia Petroleum Company—1 page—typed copy
October 30, 1941	Sylvester Dayson to Cotton Valley Operators Committee—1 page—typed copy
Undated	Typed copy of unsigned form of contract between Standard Oil Company of Louisiana and operator parties to Cotton Valley Unitization and Pressure Maintenance Agreement—4 pages
Undated	Typed copy of unsigned form of contract between W. W. Fleming, Chairman of CVOC and Standard Oil Company of Louisiana for sale of distillate —2 pages
October 23, 1941	C. L. Yancey to J. P. D'Artois, the Ohio Oil Company—1 page—typed copy
January 23, 1945	H. Leyendecker of PAW to J. R. Butler of CVOC—1 page—typed copy
July 25, 1941	"CHW" of Standard Oil Company of Louisiana to J. R. Butler of CVOC—1 page—no signature—typed copy
June 26, 1940	Unsigned declaration of operators of CVOC—typed copy—6 pages
Undated	Memorandum entitled "Summary of Unitization at Cotton Valley, Louisiana"—carbon copy of 2 pages—marked "prepared by J. P. D'Artois"
Undated	Carbon copy of 2 pages—memorandum entitled "The Cotton Valley Unitization and Pressure Maintenance Agreement", marked "prepared by J. P. D'Artois"
December 6, 1942	O. D. Donnell of Ohio Oil Company to Premier Oil Refining Company of Texas—2 pages—typed copy

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	Document Date	*Description of Document*
	January 20, 1942	Letter contract between Hunt Oil Company and Premier Oil Refining Company—5 pages—photostatic copy of unsigned carbon copy
149	February 9, 1942	Waiver signed by Hunt Oil Company—3 pages—Photostatic copy
	February 1, 1944	Supplemental Agreement between Ohio Oil Company and Premier Oil Refining Company—2 pages—carbon copy of types copy
	August 22, 1945	Telegram—Premier Oil Refining Company to Hunt Oil Company—photostatic copy
	March 5, 1942	W. F. Dalton to Ralph B. Shank—3 pages—photostatic copy of carbon copy
	April 23, 1942	Purchase contract between Ohio Oil Company and Premier Oil Refining Company of Texas—Mimeographed copy
	February 1, 1944	Certification by Petroleum Administration for War and Defense Plant Corporation—mimeographed copy
	February 1, 1944	Certification by Premier Oil Refining Company of Texas—mimeographed copy
	February 1, 1944	Waiver by Ohio Oil Company—mimeographed copy
	February 1, 1944	Supplemental Agreement between Hunt Oil Company, *et al.*, and Premier Oil Refining Company of Texas—mimeographed copy
	February 4, 1944	A. M. Gee to G. L. Parkhurst of PAW—mimeographed copy
	February 8, 1944	A. M. Gee to G. L. Parkhurst of PAW—mimeographed copy
	February 15, 1944	W. F. Dalton to Defense Supplies Corporation—mimeographed copy
	February 28, 1944	William K. Tell to George Hill—mimeographed copy
	February 1, 1944	Hunt Oil Company, *et al.* to Defense Supplies Corporation—mimeographed copy

	Document Date	*Description of Document*
	December 11, 1942	Ralph K. Davies, PAW, to H. L. Hunt —photostatic copy of carbon copy
	Undated	Unsigned contract between Hunt Oil Company, *et al.* and Premier Oil Refining Company of Texas—3 pages—photostatic copy
	November 4, 1942	J. R. Butler to E. H. Poe of OPC—3 pages—photostatic copy
	November 12, 1942	Brief filed by Cotton Valley Operators Committee with Office of Petroleum Coordinator—20 pages—photostatic copy
150	September 7, 1945	Circular letter, J. R. Butler of CVOC to all CVOC Operators—1 page —photostatic copy
	August 22, 1940	Contract between Cotton Valley Operators Committee, Premier Oil Refining Company of Texas and Woodley Petroleum Company—3 pages—typed copy
	January 6, 1943	J. R. Butler of CVOC to Sylvester Dayson—photostatic copy of copy
	January 16, 1943	President of Premier Oil Refining Company to J. R. Butler—photostatic copy of copy
	May 24, 1943	J. R. Butler of CVOC to Sylvester Dayson—photostatic copy of copy
	August 30, 1943	J. R. Butler of CVOC to Sylvester Dayson—photostatic copy of copy
	September 3, 1943	Sylvester Dayson to J. R. Butler—photostatic copy of copy
	January 30, 1945	Premier Oil Refining Company to Ohio Oil Company—photostatic copy of copy
	February 8, 1945	The Ohio Oil Company to Premier Oil Refining Co. of Texas—photostatic copy of copy
	February 10, 1945	Telegram—Premier Oil Refining Company to Ohio Oil Company—photostatic copy
	February 10, 1945	A. B. Culbertson, PAW, to J. R. Butler of CVOC—photostatic copy of copy
	February 13, 1945	The Ohio Oil Company to Premier Oil Refining Company of Texas—photostatic copy of copy

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Document Date	*Description of Document*
March 6, 1945	A. P. Frame, PAW, to J. R. Butler of CVOC
March 6, 1945	A. P. Frame, PAW, to J. R. Butler of CVOC
August 8, 1945	B. N. Barnes, PAW, to J. R. Butler of CVOC—photostatic copy of carbon copy
April 19-29, 1940	Cotton Valley Unitization and Pressure Maintenance Agreement—40-odd pages—photostatic copy
November, 1946	1 page statement of Cotton Valley Operators Committee showing sales of distillate, butane, gas and other products for month of November 1946
August, 1945	Circular S-7855 of Cotton Valley Operators Committee showing distribution of revenue by pipeline companies for August 1945—photostatic copy
September 5, 1946	Report entitled "Reserves—Cotton Valley Operators Committee" by Ralph L. Hock, petroleum engineer, addressed to T. W. McGuire, General Manager—½ inch thick pamphlet
151 Oct. 12, 1938	W. W. Fleming, Ohio Oil Co., to L. F. McCollum, Carter Oil Co.,—1 page—photostatic copy.
Dec. 27, 1938	Ohio Oil Co., from J. R. Williams, Standard Oil Co.,—1 page—photostatic copy.
Dec. 30, 1938	Ohio Oil Co., from B. P. Crittenden, Standard Oil Co., of Louisiana—1 page—photostatic copy.
Aug. 29, 1940	M. J. Rathbone, Standard Oil Co., of Louisiana—from W. W. Fleming, Cotton Valley Operators Committee—1 page—photostatic copy.
Sept. 6, 1940	All Cotton Valley Unit Operators and Members of the Operators Committee —from J. J. Frommer, Cotton Valley Operators Committee—1 page—photostatic copy.
Dec. 20, 1940	J. R. Butler, Cotton Valley Operators Committee—to Standard Oil Co., of Louisiana—1 page with 2 statements of "Adjustment for Inventory of Oil

Document Date	*Description of Document*
	and Distillate at June 29, 1940" and "Allocation of Oil and Distillate Runs for the Month of November 1940"—3 pages—photostatic copies.
Dec. 26, 1940	M. J. Rathbone, Standard Oil Co., of Louisiana—from J. R. Butler, Cotton Valley Operators Committee—1 page—photostatic copy.
Feb. 20, 1941	J. R. Butler, Cotton Valley Operators Committee—from M. J. Rathbone, Standard Oil Co., of Louisiana—1 page—photostatic copy.
Feb. 22, 1941	M. J. Rathbone, Standard Oil Co., of Louisiana—from J. R. Butler, Cotton Valley Operators Committee—1 page—photostatic copy.
March 4, 1941	J. R. Butler, Cotton Valley Operators Committee—from C. H. Whitman—1 page—photostatic copy.
March 20, 1941	P. G. Weidner, Stanolind Oil and Gas Co.,—from Pleas O. Hardwick—1 page—photostatic copy.
April 2, 1941	C. H. Whitman, Standard Oil Co., of Louisiana—from J. R. Butler, Cotton Valley Operators Committee—1 page—photostatic copy.
April 22, 1941	J. R. Butler, Cotton Valley Operators Committee—from C. H. Whitman, Standard Oil Co., of Louisiana—1 page—photostatic copy.
June 26, 1941	To Cotton Valley Operators Committee—from L. F. Walker, Magnolia Petroleum Co.,—1 page—photostatic copy.
152 June 27, 1941	Cotton Valley Operators Committee—from W. T. Reed, Premier Oil Refining Co., of Texas—1 page—photostatic copy.
Aug. 7, 1941	J. P. D'Artois, Ohio Oil Co.,—from C. L. Yancey, Standard Oil Co., of Louisiana—1 page—photostatic copy.
Sept. 12, 1941	J. R. Butler, Cotton Valley Operators Committee—from C. H. Whitman, Standard Oil Co., of Louisiana—1 page—photostatic copy.

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Document Date	*Description of Document*
Sept. 12, 1941	Cotton Valley Unit Operators—from Standard Oil Co., of Louisiana—1 page—photostatic copy.
Oct. 27, 1941	Standard Oil Co., of Louisiana—from J. R. Butler, enclosing copy of Division Order approved by Legal Committee of the Cotton Valley Operators Committee—2 pages—photostatic copy
Oct. 29, 1940	J. R. Butler, Cotton Valley Operators Committee—from C. H. Whitman, Standard Oil Co., of Louisiana—1 page—photostatic copy.
Nov. 4, 1941	J. R. Butler, Cotton Valley Operators Committee—from C. L. Yancey, Standard Oil Co., of Louisiana—1 page—photostatic copy.
Nov. 28, 1941	Telegram to J. R. Butler, Cotton Valley Operators Committee—from M. J. Rathbone, Standard Oil Co. of Louisiana—1 page—photostatic copy.
Dec. 4, 1941	Telegram to J. R. Butler, Cotton Valley Operators Committee—from M. J. Rathbone, Standard Oil Co. of Louisiana—1 page—photostatic copy.
June 11, 1942	J. R. Butler, Cotton Valley Operators Committee—from R. M. Chan—1 page—photostatic copy.
Aug. 17, 1942	Standard Oil Co., of Louisiana—from H. H. Fullilove, Cotton Valley Operators Committee—enclosing statement of purchases by Standard Oil Co. of Louisiana, for the month of July 1942—2 pages—photostatic copy.
March 2, 1943	J. R. Butler, Cotton Valley Operators Committee—from C. H. Whitman, Standard Oil Co. of Louisiana—1 page—photostatic copy.
March 15, 1943	C. H. Whitman, Standard Oil Co. of Louisiana—from J. R. Butler, Cotton Valley Operators Committee—1 page—photostatic copy.
Feb. 9, 1944	J. R. Butler, Cotton Valley Operators Committee—to M. J. Rathbone, Standard Oil Co. of Louisiana—2 pages—photostatic copy.

	Document Date	*Description of Document*
153	Nov. 21, 1945	H. L. Hunt, Hunt Oil Company—to Standard Oil Co. of New Jersey—3 pages—photostatic copies.
	Nov. 21, 1945	Ohio Oil Company—to Standard Oil Co. of New Jersey—3 pages—photostatic copies.
	January 1946	Statement by Cotton Valley Operators Committee of Distribution of Receipts to Operators.
	September 1946	Statement by Cotton Valley Operators Committee of Distribution of Receipts to Operators.
	October 1946	Statement by Cotton Valley Operators Committee of Distribution of Receipts to Operators.
	December 1946	Statement by Cotton Valley Operators Committee of Distribution of Receipts to Operators.
	July 30, 1948	O. B. Hogan, Esso Standard Oil Company—from P. M. Goodwin, Cotton Valley Operators Committee—1 page—photostatic copy.
	Aug. 3, 1948	To Esso Standard Oil Company—from P. M. Goodwin Cotton Valley Operators Committee—1 page—photostatic copy.

(File Endorsement Omitted)

154 In United States District Court

(Title Omitted)

(File Endorsement Omitted)

Interrogatories Served on Plaintiff by Defendant Magnolia Petroleum Company Under Rule 33—Filed January 20, 1949

To:

Malcolm E. Lafargue
United States Attorney
Shreveport, Louisiana

Daniel Britt
Special Assistant to the Attorney General
Washington, D. C.

Charles L. Black
Dan Moody
Capital National Bank Bldg.
Austin, Texas

David E. Smitherman
209 Commercial Natl. Bank Bldg.
Shreveport, Louisiana

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Willard R. Memler
Special Attorney
Washington, D. C.
C. W. Barnes, Jr.
National Bank of Tulsa Bldg.
Tulsa, Oklahoma
J. Percy Rice
Russell V. Rogers, Jr.
Mercantile Bank Bldg.
Dallas, Texas
R. Goff, Jr.
1107 City Bank Bldg.
Shreveport, Louisiana
A. M. Gee
539 Main Street
Findlay, Ohio
Jas. D. Heldt
930 Mercantile Bank Bldg.
Dallas, Texas
John T. Guyton
United Gas Building
Shreveport, Louisiana
Blalock, Blalock, Lohman & Blalock
Gulf Building
Houston, Texas

Sidney G. Myers
723 Giddens Lane Bldg.
Shreveport, Louisiana
Herold, Cousin & Herold
1625 Slattery Building
Shreveport, Louisiana
Leon O'Quin
Arthur O'Quin
424 First Natl. Bank Bldg.
Shreveport, Louisiana
J. Fred Green
Ada, Oklahoma
C. F. Currier
J. P. D'Artois
Commercial Natl. Bank Bldg.
Shreveport, Louisiana
Leslie Moses
City Bank Building
Shreveport, Louisiana
Wilkinson, Lewis & Wilkinson
1525 Slattery Building
Shreveport, Louisiana

155 Defendant Magnolia Petroleum Company, under the terms of Rule 33, Federal Rules of Civil Procedure, hereby serves upon plaintiff, United States of America, written interrogatories, to be answered separately and fully, in writing, under oath, in the form and within the time provided for in said rule.

INTERROGATORIES RELATING TO THE ALLEGED COMBINATION AND CONSPIRACY

Interrogatory No. 1—Do you contend that the alleged combination and conspiracy is evidenced by any written contract or contracts to which this defendant is a party?

Interrogatory No. 1-A—If so, what is the date of such contract or contracts, what is the substance thereof, and what other parties executed it?

Interrogatory No. 1-B—If so, what parts of said contract or contracts do you contend evidence such alleged combination and conspiracy?

Interrogatory No. 2—Do you contend that the alleged combination and conspircy is evidenced by any oral contract or contracts to which this defendant is a party?

Interrogatory No. 2-A—If so, what is the date of such contract or contracts, what is the substance thereof, and what other persons were parties thereto?

Interrogatory No. 2-B—If so, what parts of said contract or contracts do you contend evidence such alleged combination and conspiracy?

Interrogatory No. 3—Do you contend that the alleged combination and conspiracy is evidenced by any letters sent by this defendant?

Interrogatory No. 3-A—If so, what are the dates of such letters, what is the substance thereof, and to whom were they sent?

Interrogatory No. 3-B—If so, what parts of such letters do you contend evidence such alleged combination and conspiracy?

Interrogatory No. 4—Do you contend that the alleged combination and conspiracy is evidenced by any letters sent to defendant?

Interrogatory No. 4-A—If so, what are the dates
156 of such letters, what is the substance thereof, and by whom were they sent?

Interrogatory No. 4-B—If so, what parts of such letters do you contend evidence such alleged combination and conspiracy?

Interrogatory No. 5—Do you contend that the alleged combination and conspiracy is evidenced by any telegrams sent by this defendant?

Interrogatory No. 5-A—If so, what are the dates of such telegrams, what is the substance thereof, and to whom were they sent?

Interrogatory No. 5-B—If so, what parts of such telegrams do you contend evidence such alleged combination and conspiracy?

Interrogatory No. 6—Do you contend that the alleged combination and conspiracy is evidenced by any telegrams sent to this defendant?

Interrogatory No. 6-A—If so, what are the dates of such telegrams, what is the substance thereof, and by whom were they sent?

Interrogatory No. 6-B—If so, what parts of such telegrams do you contend evidence such alleged combination and conspiracy?

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Interrogatory No. 7—Do you contend that the alleged combination and conspiracy is evidenced by any conversations to which this defendant, its officials, agents, servants, attorneys or employees were parties?

Interrogatory No. 7-A—If so, give the time, place, substance, and names of persons participating therein.

Interrogatory No. 7-B—If so, what portions of said conversations do you contend evidence such alleged combination and conspiracy?

Interrogatory No. 8—Do you contend that such alleged combination and conspiracy was entered into by any officials, agents, servants, attorneys or employees of this defendant?

Interrogatory No. 8-A—If so, give their names and addresses.

Interrogatory No. 9—Do you contend that this alleged combination and conspiracy was the result of any overt act of this defendant?

Interrogatory No. 9-A—If so, what act or acts are relied upon? Give the time, nature and substance of each and the names of the officials, agents, servants, attorneys and employees of this defendant participating therein.

Interrogatory No. 10—What are the names and addresses of all the witnesses by whom you expect to prove
157 the alleged combination and conspiracy entered into by this defendant?

Interrogatory No. 10-A—Briefly and succinctly, what do you expect to prove as against this defendant by each?

Interrogatory No. 10-B—What written statements have you obtained from those whom you expect to use as witnesses?

(1) Briefly and succinctly, what is the nature of each?

Interrogatory No. 10-C—What oral statements have you obtained from those whom you expect to use as witnesses?

(1) Briefly and succinctly, what is the nature of each?

Interrogatory No. 11—What inferences do you rely upon and will you rely upon to establish that this defendant entered into the alleged combination and conspiracy?

Interrogatory No. 12—What circumstantial evidence do you rely upon and will you rely upon to establish that this defendant entered into the alleged combination and conspiracy?

Interrogatory No. 13—What acts or declarations of the co-defendants of this defendant or alleged co-conspirators of this defendant, whether parties or not, do you rely upon to establish that this defendant entered into the alleged combination and conspiracy?

Interrogatory No. 14—Do you contend that the alleged combination and conspiracy is evidenced by any acts of this defendant in participating in the meetings of the Cotton Valley Operators Committee?

Interrogatory No. 14-A—If so, what are the dates of such meetings, what acts are relied upon, and what participation did this defendant take therein?

Interrogatory No. 15—Do you contend that the alleged combination and conspiracy is evidenced by any minutes or resolutions of the Cotton Valley Operators Committee?

Interrogatory No. 15-A—If so, what are the dates of such minutes or resolutions, and what part thereof do you contend evidences such alleged combination and conspiracy?

158 INTERROGATORIES RELATING TO THE ALLEGED MONOPOLY

Interrogatory No. 16—Do you contend that the alleged monopoly is evidenced by any written contract or contracts to which this defendant is a party?

Interrogatory No. 16-A—If so, what is the date of such contract or contracts, what is the substance thereof, and what other parties executed it?

Interrogatory No. 16-B—If so, what parts of said contract or contracts do you contend evidence such alleged monopoly?

Interrogatory No. 17—Do you contend that the alleged monopoly is evidenced by any oral contract or contracts to which this defendant is a party?

Interrogatory No. 17-A—If so, what is the date of such contract or contracts, what is the substance thereof, and what other persons were parties thereto?

Interrogatory No. 17-B—If so, what parts of said contract or contracts do you contend evidence such alleged monopoly?

Interrogatory No. 18—Do you contend that the alleged monopoly is evidenced by any letters sent by this defendant?

Interrogatory No. 18-A—If so, what are the dates of such letters, what is the substance thereof, and to whom were they sent?

Interrogatory No. 18-B—If so, what parts of such letters do you contend evidence such alleged monopoly?

Interrogatory No. 19—Do you contend that the alleged monopoly is evidenced by any letters sent to defendant?

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Interrogatory No. 19-A—If so, what are the dates of such letters, what is the substance thereof, and by whom were they sent?

Interrogatory No. 19-B—If so, what parts of such letters do you contend evidence such alleged monopoly?

Interrogatory No. 20—Do you contend that the alleged monopoly is evidenced by any telegrams sent by this defendant?

Interrogatory No. 20-A—If so, what are the dates of such telegrams, what is the substance thereof, and to whom were they sent?

Interrogatory No. 20-B—If so, what parts of such
159 telegrams do you contend evidence such alleged monopoly?

Interrogatory No. 21—Do you contend that the alleged monopoly is evidenced by any telegrams sent to this defendant?

Interrogatory No. 21-A—If so, what are the dates of such telegrams, what is the substance thereof, and by whom were they sent?

Interrogatory No. 21-B—If so, what parts of such telegrams do you contend evidence such alleged monopoly?

Interrogatory No. 22—Do you contend that the alleged monopoly is evidenced by any conversations to which this defendant, its officials, agents, servants, attorneys or employees were parties?

Interrogatory No. 22-A—If so, give the time, place, substance, and names of persons participating therein.

Interrogatory No. 22-B—If so, what portions of said conversations do you contend evidence such alleged monopoly?

Interrogatory No. 23—Do you contend that such alleged monopoly was entered into by any officials, agents, servants, attorneys or employees of this defendant?

Interrogatory No. 23-A—If so, give their names and addresses.

Interrogatory No. 24—Do you contend that this alleged monopoly was the result of any overt act of this defendant?

Interrogatory No. 24-A—If so, what act or acts are relied upon? Give the time, nature and substance of each and the names of the officials, agents, servants, attorneys and employees of this defendant participating therein.

Interrogatory No. 25—What are the names and addresses of all the witnesses by whom you expect to prove the alleged monopoly entered into by this defendant?

Interrogatory No. 25-A—Briefly and succinctly, what do you expect to prove as against this defendant by each?

Interrogatory No. 25-B—What written statements have you obtained from those whom you expect to use as witnesses?

(1) Briefly and succinctly, what is the nature of each?

Interrogatory No. 25-C—What oral statements have you obtained from those whom you expect to use as witnesses?

(1) Briefly and succinctly, what is the nature of each?

160 *Interrogatory No. 26*—What inferences do you rely upon and will you rely upon to establish that this defendant entered into the alleged monopoly?

Interrogatory No. 27—What circumstantial evidence do you rely upon and will you rely upon to establish that this defendant entered into the alleged monopoly?

Interrogatory No. 28—What acts or declarations of the co-defendants of this defendant or alleged co-conspirators of this defendant, whether parties or not, do you rely upon to establish that this defendant entered into the alleged monopoly?

Interrogatory No. 29—Do you contend that the alleged monopoly is evidenced by any acts of this defendant in participating in the meetings of the Cotton Valley Operators Committee?

Interrogatory No. 29-A—If so, what are the dates of such meetings, what acts are relied upon, and what participation did this defendant take therein?

Interrogatory No. 30—Do you contend that the alleged monopoly is evidenced by any minutes or resolutions of the Cotton Valley Operators Committee?

Interrogatory No. 30-A—If so, what are the dates of such minutes or resolutions, and what part thereof do you contend evidences such alleged monopoly?

INTERROGATORIES RELATING TO THE ALLEGED PRICE-FIXING

Interrogatory No. 31—Do you contend that the alleged price-fixing is evidenced by any written contract or contracts to which this defendant is a party?

Interrogatory No. 31-A—If so, what is the date of such contract or contracts, what is the substance thereof, and what other parties executed it?

Interrogatory No. 31-B—If so, what parts of said contract or contracts do you contend evidence such alleged price-fixing?

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Interrogatory No. 32—Do you contend that the alleged price-fixing is evidenced by any oral contract or con-
161 tracts to which this defendant is a party?

Interrogatory No. 32-A—If so, what is the date of such contract or contracts, what is the substance thereof, and what other persons were parties thereto?

Interrogatory No. 32-B—If so, what parts of said contract or contracts do you contend evidence such alleged price-fixing?

Interrogatory No. 33—Do you contend that the alleged price-fixing is evidenced by any letters sent by this defendant?

Interrogatory No. 33-A—If so, what are the dates of such letters, what is the substance thereof, and to whom were they sent?

Interrogatory No. 33-B—If so, what parts of such letters do you contend evidence such alleged price-fixing?

Interrogatory No. 34—Do you contend that the alleged price-fixing is evidenced by any letters sent to defendant?

Interrogatory No. 34-A—If so, what are the dates of such letters, what is the substance thereof, and by whom were they sent?

Interrogatory No. 34-B—If so, what parts of such letters do you contend evidence such alleged price-fixing?

Interrogatory No. 35—Do you contend that the alleged price-fixing is evidenced by any telegrams sent by this defendant?

Interrogatory No. 35-A—If so, what are the dates of such telegrams, what is the substance thereof, and to whom were they sent?

Interrogatory No. 35-B—If so, what parts of such telegrams do you contend evidence such alleged price-fixing?

Interrogatory No. 36—Do you contend that the alleged price-fixing is evidenced by any telegrams sent to this defendant?

Interrogatory No. 36-A—If so, what are the dates of such telegrams, what is the substance thereof, and by whom were they sent?

Interrogatory No. 36-B—If so, what parts of such telegrams do you contend evidence such alleged price-fixing?

Interrogatory No. 37—Do you contend that the alleged price-fixing is evidenced by any conversations to which this defendant, its officials, agents, servants, attorneys or employees were parties?

Interrogatory No. 37-A—If so, give the time, place, substance, and names of persons participating therein.

Interrogatory No. 37-B—If so, what portions of said conversations do you contend evidence such alleged price-fixing?

Interrogatory No. 38—Do you contend that such alleged price-fixing was entered into by any officials, agents, servants, attorneys or employees of this defendant?

Interrogatory No. 38-A—If so, give their names and addresses.

Interrogatory No. 39—Do you contend that this alleged price-fixing was the result of any overt act of this defendant?

Interrogatory No. 39-A—If so, what act or acts are relied upon? Give the time, nature and substance of each and the names of the officials, agents, servants, attorneys and employees of this defendant participating therein.

Interrogatory No. 40—What are the names and addresses of all the witnesses by whom you expect to prove the alleged price-fixing entered into by this defendant?

Interrogatory No. 40-A—Briefly and succinctly, what do you expect to prove as against this defendant by each?

Interrogatory No. 40-B—What written statements have you obtained from those whom you expect to use as witnesses?

(1) Briefly and succinctly, what is the nature of each?

Interrogatory No. 40-C—What oral statements have you obtained from those whom you expect to use as witnesses?

(1) Briefly and succinctly, what is the nature of each?

Interrogatory No. 41—What inferences do you rely upon and will you rely upon to establish that this defendant entered into the alleged price-fixing?

Interrogatory No. 42—What circumstantial evidence do you rely upon and will you rely upon to establish that this defendant entered into the alleged price-fixing?

Interrogatory No. 43—What acts or declarations of the co-defendants of this defendant or alleged co-conspirators of this defendant, whether parties or not, do you rely upon to establish that this defendant entered into the alleged price-fixing?

Interrogatory No. 44—Do you contend that the alleged price-fixing is evidenced by any acts of this defend-
163 ant in participating in the meetings of the Cotton Valley Operators Committee?

Interrogatory No. 44-A—If so, what are the dates of such meetings, what acts are relied upon, and what participation did this defendant take therein?

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Interrogatory No. 45—Do you contend that the alleged price-fixing is evidenced by any minutes or resolutions of the Cotton Valley Operators Committee?

Interrogatory No. 45-A—If so, what are dates of such minutes or resolutions, and what part thereof do you contend evidences such alleged price-fixing?

INTERROGATORIES RELATING TO THE ALLEGED COMMON SELLING AGENT

Interrogatory No. 46—Do you contend that the alleged common selling agent is evidenced by any written contract or contracts to which this defendant is a party?

Interrogatory No. 46-A—If so, what is the date of such contract or contracts, what is the substance thereof, and what other parties executed it?

Interrogatory No. 46-B—If so, what parts of said contract or contracts do you contend evidence such alleged common selling agent?

Interrogatory No. 47—Do you contend that the alleged common selling agent is evidenced by any oral contract or contracts to which this defendant is a party?

Interrogatory No. 47-A—If so, what is the date of such contract or contracts, what is the substance thereof, and what other persons were parties thereto?

Interrogatory No. 47-B—If so, what parts of said contract or contracts do you contend evidence such alleged common selling agent?

Interrogatory No. 48—Do you contend that the alleged common selling agent is evidenced by any letters sent by this defendant?

Interrogatory No. 48-A—If so, what are the dates of such letters, what is the substance thereof, and to whom were they sent?

Interrogatory No. 48-B—If so, what parts of such
164 letters do you contend evidence such alleged common selling agent?

Interrogatory No. 49—Do you contend that the alleged common selling agent is evidenced by any letters sent to defendant?

Interrogatory No. 49-A—If so, what are the dates of such letters, what is the substance thereof, and by whom were they sent?

Interrogatory No. 49-B—If so, what parts of such letters do you contend evidence such alleged common selling agent?

Interrogatory No. 50—Do you contend that the alleged common selling agent is evidenced by any telegrams sent by this defendant?

Interrogatory No. 50-A—If so, what are the dates of such telegrams, what is the substance thereof, and to whom were they sent?

Interrogatory No. 50-B—If so, what parts of such telegrams do you contend evidence such alleged common selling agent?

Interrogatory No. 51—Do you contend that the alleged common selling agent is evidenced by any telegrams sent to this defendant?

Interrogatory No. 51-A—If so, what are the dates of such telegrams, what is the substance thereof, and by whom were they sent?

Interrogatory No. 51-B—If so, what parts of such telegrams do you contend evidence such alleged common selling agent?

Interrogatory No. 52—Do you contend that the alleged common selling agent is evidenced by any conversations to which this defendant, its officials, agents, servants, attorneys or employees were parties?

Interrogatory No. 52-A—If so, give the time, place, substance, and names of persons participating therein.

Interrogatory No. 52-B—If so, what portions of said conversations do you contend evidence such alleged common selling agent?

Interrogatory No. 53—Do you contend that the designation of such alleged common selling agent was by any officials, agents, servants, attorneys or employees of this defendant?

Interrogatory No. 53-A—If so, give their names and addresses.

Interrogatory No. 54—Do you contend that this alleged common selling agent was the result of any overt act of this defendant?

Interrogatory No. 54-A—If so, what act or acts are relied upon? Give the time, nature and substance of
165 each and the names of the officials, agents, servants, attorneys and employees of this defendant participating therein.

Interrogatory No. 55—What are the names and addresses of all the witnesses by whom you expect to prove the designation by this defendant of said alleged common selling agent?

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Interrogatory No. 55-A—Briefly and succinctly, what do you expect to prove as against this defendant by each?

Interrogatory No. 55-B—What written statements have you obtained from those whom you expect to use as witnesses?

(1) Briefly and succinctly, what is the nature of each?

Interrogatory No. 55-C—What oral statements have you obtained from those whom you expect to use as witnesses?

(1) Briefly and succinctly, what is the nature of each?

Interrogatory No. 56—What inferences do you rely upon and will you rely upon to establish that this defendant designated such common selling agent?

Interrogatory No. 57—What circumstantial evidence do you rely upon and will you rely upon to establish that this defendant designated such alleged common selling agent?

Interrogatory No. 58—What acts or declarations of the co-defendants of this defendant or alleged co-conspirators of this defendant, whether parties or not, do you rely upon to establish that this defendant designated such alleged common selling agent?

Interrogatory No. 59—Do you contend that the designation of such alleged common selling agent is evidenced by any acts of this defendant in participating in the meetings of the Cotton Valley Operators Committee?

Interrogatory No. 59-A—If so, what are the dates of such meetings, what acts are relied upon, and what participation did this defendant take therein?

Interrogatory No. 60—Do you contend that the designation of such alleged common selling agent is evidenced by any minutes or resolutions of the Cotton Valley Operators Committee?

Interrogatory No. 60-A—If so, what are the dates of such minutes or resolutions, and what part thereof do you
166 contend evidences the designation of such alleged common selling agent?

MISCELLANEOUS INTERROGATORIES

Interrogatory No. 61—On what date do you contend that the operation of the plant of the CVOC at Cotton Valley, Louisiana became illegal?

Interrogatory No. 62—What specific process or procedure in such plant do you contend rendered its operations illegal?

Interrogatory No. 63—Exactly what physical equipment was involved in this alleged illegal operation?

Interrogatory No. 64—Exactly what change in process or procedure do you contend should be enjoined by the court?

Interrogatory No. 65—Exactly what physical equipment of said plant should be shut down or its use changed do you contend should be enjoined by the court?

Interrogatory No. 66—Do you contend that defendant Magnolia Petroleum Company is now agreeing on prices of its products produced through the CVOC plant?

Interrogatory No. 66-A—If so, through whom and by what is this agreement being effected?

Interrogatory No. 67—Do you contend that since the filing of this suit defendant Magnolia Petroleum Company has agreed with any other defendant or with any alleged co-conspirator to fix the prices of its products produced through the CVOC plant?

Interrogatory No. 68—Do you contend that defendant Magnolia Petroleum Company now has designated a common selling agent to dispose of its products produced through the CVOC plant?

Interrogatory No. 68-A—If so, who is this alleged common selling agent and by whom and how was said common selling agent designated?

Interrogatory No. 69—Do you contend that since the filing of this suit defendant Magnolia Petroleum Company has agreed with any other defendant or with any alleged co-conspirator to designate any common selling agent to dispose of its products produced through the CVOC plant?

167 Dated this 18th day of January, 1948.

DIXON CARROLL
Ricou-Brewster Bldg.
Shreveport 95, Louisiana

WALLACE HAWKINS
EARL A. BROWN
P. O. Box 900
2311 Magnolia Bldg.
Dallas 1, Texas

CHAS. B. WALLACE

Chas. B. Wallace
P. O. Box 900
2311 Magnolia Bldg.
Dallas 1, Texas
Attorneys for Defendant
Magnolia Petroleum Company

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168 THE STATE OF TEXAS }
COUNTY OF DALLAS }

BEFORE ME, the undersigned authority, on this day personally appeared CHAS. B. WALLACE, known to me, who, being by me duly sworn, on his oath deposes and says:

My name is Chas. B. Wallace. I am one of the attorneys of record for defendant Magnolia Petroleum Company in the above-numbered and -entitled cause. On Tuesday, January 18, 1949, I placed in the United States mail a true and correct copy of the above and foregoing fourteen pages of Interrogatories, addressed to the persons whose names and addresses appear on page 1, by air mail, with all postage fully pre-paid.

CHAS. B. WALLACE

SWORN TO AND SUBSCRIBED BEFORE ME this 19th day of January, 1949, to certify which witness my hand and seal of office.

ROBERTA LANDRESS
Roberta Landress, *Notary Public*
(Seal) *in and for Dallas County, Texas*

169 In United States District Court

(Title Omitted)

Motion by Plaintiff for an Order Sustaining Objections to Interrogatories—Filed Feb. 14, 1949

Plaintiff, United States of America, respectfully moves this Court for an order sustaining its objections to the interrogatories of the defendant Magnolia Petroleum Company.

S) DANIEL B. BRITT
Daniel B. Britt
Special Assistant to the Attorney General

S) WILLARD R. MEMLER
Willard R. Memler
Special Attorney

S) MALCOLM E. LAFARGUE
Malcolm E. Lafargue
United States Attorney

171 In the United States District Court

(Title Omitted)

Plaintiff's Objections to Interrogatories Filed by Magnolia Petroleum Company—Filed Feb. 14, 1949

The United States of America, plaintiff in the above styled cause, objects to each and every one of the interrogatories filed by the defendant Magnolia Petroleum Company on the following grounds:

A. General Objections to All of the Interrogatories

I

The interrogatories relating to documents call for substantially the same information which has already been furnished to the Magnolia Petroleum Company by the plaintiff.

II

The interrogatories relating to oral contracts or testimony of witnesses seek information beyond the identity and location of persons having knowledge of relevant facts and are outside the scope of proper examination.

B. Specific Objections to Certain Interrogatories

Interrogatories Nos. 1-B, 2-B, 3-B, 4-B, 5-B, 6-B, 7-B, 9-A, 11, 12, 13, 14-A (last part) and 15-A (last part) are objected to specifically because they seek plaintiff's in-
172 terpretation of the evidence, opinions of the plaintiff, contentions of the plaintiff, plaintiff's conclusions of fact and law and preparation of the plaintiff's case for trial.

II

Interrogatories Nos. 10-A, 10-C, and 10-C(1) are objected to specifically because they seek plaintiff's version of oral statements of witnesses.

III, IV and V

The sections of the interrogatories entitled: "Interrogatories Relating to the Alleged Monopoly," "Interrogatories Relating to the Alleged Price Fixing," "Interrogatories Relating to the Alleged Common Selling Agent," are included in and are necessarily and inseparably a part of the first section of the interrogatories entitled "Interrogatories Relating to the Alleged Combination and Conspiracy".

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VI

Interrogatories Nos. 61, 62, and 63 are objected to on the ground that they call for contentions and opinions of the plaintiff and relate to charges which are not alleged in the complaint.

VII

Interrogatories Nos. 64 and 65 are objected to on the ground that they are premature because they require the plaintiff to determine the relief to be granted by the Court in advance of the trial.

VIII

Interrogatories Nos. 66, 67, 68, and 69 are objected to on the grounds that they seek opinions and contentions of the plaintiff.

173 It is respectfully submitted that the above objections should be sustained for the reasons set forth in the plaintiff's brief submitted herewith in support thereof.

S) DANIEL B. BRITT
Daniel B. Britt
Special Assistant to the Attorney General

S) WILLARD R. MEMLER
Willard R. Memler
Special Attorney

S) MALCOLM E. LAFARGUE
Malcolm E. Lafargue
United States Attorney

(File Endorsement Omitted)

174 In United States District Court
Western District of Louisiana
Shreveport Division
(File Endorsement Omitted)
No. 2209 Civil Action
UNITED STATES OF AMERICA
vs.
COTTON VALLEY OPERATORS COMMITTEE, *et al.*

Transcript of Hearing—Filed July 5, 1949

Argument and proceedings had in the above numbered and entitled cause, at Shreveport, Louisiana, beginning at

10:00 o'clock A. M., March 11, 1949, before the Honorable Ben C. Dawkins, Judge of the United States District Court, Western District of Louisiana, relating to certain motions pending before the Court.

APPEARANCES:

Malcolm E. Laf Argue, United States Attorney, Western District of Louisiana; Daniel B. Britt, Special Assistant to the Attorney General, and Willard B. Memler, Special Attorney, all representing the plaintiff.

Charles B. Wallace, Magnolia Bldg., Dallas, Texas, representing Magnolia Petroleum Company, a defendant.

Arthur O'Quin, Shreveport, La., representing the Ohio Oil Company, a Defendant.

Robert T. Russ, Official Reporter, United States District Court, Western District of Louisiana.

PROCEEDINGS

175 *Colloquy*

The COURT: I notice by this calendar that one of the matters fixed for hearing this morning is with regard to the motion to strike the second amended petition.

I have not had time to prepare any official opinion, but I have further examined my original conclusions in this connection, especially with regard to the point at which the alleged illegality, or illegal actions of the defendant began.

The effect of this amendment is to say, in substance as I appreciate it, that the illegal activity began when the gas had been extracted, that is the gasoline had been taken out of the gas, and part of the residue recycled into the earth, and that from then on all of the activities in moving, transporting and marketing of the gas were in a conspiracy, according to the contention of the plaintiff. I believe that amendment is sufficient, and the motion to strike will be denied.

As I say, gentlemen, I have been so busy with other matters that I have not had an opportunity to take this record and study it sufficiently to know what remaining motions may be before us for consideration. I have had the Clerk to check the record for me and attempt to present to me for my consideration those matters which are still left before us. That was done, and this motion to strike was one of the features presented.

Mr. O'QUIN: There are some other motions pending, your Honor.

The COURT: Was a motion to produce against you pending?

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Mr. O'Quin: Yes. You have not passed on that.

176 The Court: By conclusion with regard to that was that you were entitled to have them produce whatever was not contrary to my ruling with regard to the other defendants who moved to produce, and I felt that any documentary evidence which is relevant to the issues in the case should be produced.

Of course, the motion shows on its face that many of these documents are copies taken from your records, and that you knew just what they were. Of course, you would have the originals of those, and you could refer to those and not need copies.

However, I take it that the main purpose of the motion is to find out just what they have.

Mr. O'Quin: Not only that, if your Honor pleases, but we asked for the FBI reports, and other documentary evidence which they have not produced, but which we wish produced for the purposes stated in our motion.

The Court: Well, that brings up the question of confidential communications. If this were in a proposed criminal prosecution I do not think that the FBI reports would have to be introduced.

Mr. Britt: Furthermore, if your Honor pleases, we contend that these FBI reports would not be admissible even under the Hickman case, which I am sure your Honor has read—I mean to say even in a civil action.

The Court: Yes, I have read that case, and have a fair recollection of the ruling in it. However, it is very hard for me to differentiate between what I consider you

177 are legally entitled to get, and what I do not think you are entitled to have. I believe the best way to do that would be to get around the table with you gentlemen and make rulings on each point as we go along.

Mr. Britt: We have already furnished all of the documents that we were asked for under that motion to produce. The only question remaining is the reports made by the law clerks of the Attorney General to him. As to those we seriously object to any examination by defense counsel.

The Court: Well, when I finish with the matters before me today I will get together with you people and we will settle that.

We will now take up some motions which were specially set for hearing today. The first of these I believe is a motion by the plaintiff directed at certain interrogatories filed by the Magnolia Petroleum Company. Am I right on that?

Mr. BRITT: I believe so, your Honor. They have submitted interrogatories to us, and we have filed objections to all of them, and special objections to certain of them. We are prepared to take those up at this time, if your Honor desires.

The COURT: You may proceed.

Argument on Behalf of Government

Mr. BRITT: The Magnolia Petroleum Company served on the plaintiff in this case a large number of so-called interrogatories.

I think that an orderly consideration might best be had by considering our objections to the interrogatories in the light of the proceedings in the case, including the complaint.

178 It might be well to keep in mind from the outset the special charges of the complaint, chief of which is violation of the Sherman Act, United States Code, Sections 1 and 2, and that the gist of the offense which is charged is conspiracy, and that the doing of any act or thing is not either a part of the offense charged, nor a necessary allegation. It is the meeting of the minds of the parties which is the gist of the crime under the Sherman Act. This is not a conspiracy to commit a crime, as we have in our regular conspiracy cases, but the conspiracy is the crime itself.

In this case we have alleged certain parties to that conspiracy, alleging that each was a party to the conspiracy.

As we all know, in any conspiracy, even a criminal law conspiracy, it can only be looked at, not from the separate acts of the parties themselves, but it must be looked at in its entirety. Keeping this in mind then, we have carefully examined these interrogatories which have been presented to us, and which have been propounded under Rule 33 of the Rules of Civil Procedure, this rule being particularly applicable to discovery. The government understands the purpose and object of this rule was and is that all of the parties to a suit should place their cards on the table and not put the opposition in the position of coming into court and meeting a stacked deck, or having one's opponent pull an ace from his sleeve. However, there are certain things, even under a most liberal interpretation of the rule, that still remain sacred. There are certain limitations, and there are certain questions which are not properly asked of a complainant, particularly one in the position of the Government of the United States.

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179 In an ordinary case where interrogatories are directed to the plaintiff, that plaintiff is either an individual, or a corporation, acting through its officers or agents, who would have some personal knowledge of the subject matter of the complaint. Here there is no officer or agent of the government who had any part in it, or who could have such personal knowledge of the transaction. The only information that the government has is what it could secure by way of information which was obtained through and from the defendants themselves, or from outside parties. Thus we are in a peculiar position, which is a little different than the ordinary claimant, one who had participated in the transaction.

So, with these general statements in mind, and with these considerations before us, we filed general objections to all of the interrogatories, and special objections to certain of them.

Our general objections go those parts of the interrogatories which question us about interpretations of the contents of documents, and as to those we say we have given them everything we could possibly be required, or expected to give. We have turned over to them every document in our possession upon which we relied to proceed in this case, and as to those, in these interrogatories, the wording of the interrogatories, by it Mr. Wallace wants us to go ahead and examine them and interpret them, and to point out to him their legal meaning. He wants us to have a legal argument about the case over the interrogatories. I do not think we are required to do that even under a most liberal interpretation of the rule.

Then our second general objection relates to the interrogatories having to do with oral contracts, or testi-
180 mony of witnesses. I tell you here today that we will furnish him with the names of everyone we know, every person we know, who has any knowledge of any of the material facts in this lawsuit.

We may have interviewed some of these witnesses and turned them off. We may call some of them as witnesses. I do not know exactly until we have our case more fully prepared who we will call, but at least we will give them the same opportunity we have had to examine them and get their own version of what they will say. He wants us now on the oral part of the testimony to tell him what we think these people will say, and then interpret for him what it will prove, and how it will tie in his client, and how it will prove conspiracy. He wants us to argue the case

through our interpretation of what the meaning of the testimony of the witnesses will be, and we do not think that is a part of discovery, and we do not think we should be required to do that. So much for our general objection.

Then our specific objections begin with interrogatory No. 1-B under what I supposed Mr. Wallace would call his miscellaneous interrogatories, which, after asking us if we contend that the alleged combination and conspiracy is evidenced by any written contract or contracts to which this party is the defendant, and if so to give the date of such contract or contracts, the substance thereof and what parties executed it, he asks:

"If so, what parts of said contract or contracts do you contend evidence such alleged combination and conspiracy?"

Well, there are a number of written contracts of which we have furnished him copies, but whether they are
181 evidence of conspiracy is a matter for the Court to determine. He wants us to argue that point with him now. What argument does he want us to make? He has the contracts, and so have we. We say that they show a conspiracy; he says they do not, or that he cannot find out where they show evidence of it. We do not think we should be called on to give our interpretation at this time of these contracts. He has the contracts; he can interpret them just as well as we.

"If so, what parts of said contract or contracts do you contend evidence such alleged combination and conspiracy?"

He is arguing my case with me through interrogatories.

Then in interrogatory No. 2-B he asks the same question. There we answer again that he has the contract, and can place his own interpretation on it.

He goes on from there to letters and telegrams, which he wants us to interpret. He has copies of all that we have, and there again he can place his own interpretation.

Then in interrogatory No. 4 he asks: "Do you contend that the alleged combination and conspiracy is evidenced by any letters sent to defendants?" There again we make the same answer.

In interrogatory No. 5 he gets down to telegrams, and asks the same questions there, to which our reply is the same.

Skipping rapidly through the interrogatories, and coming down to interrogatory No. 9, he asks:

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"Do you contend that this alleged combination and conspiracy was the result of any overt act of this defendant?" Then interrogatory No. 9-A:

182 "If so, what act or acts are relied upon?" Then it goes into a detail on that.

Well, we say in the complaint that they were conspirators, and any overt act of any conspirator is evidence of a conspiracy against his co-conspirator, and that if it is not clear in the complaint it should have been taken care of in a bill of particulars rather than interrogatories. We do not wish to suggest any different methods of discovery, but we do not see where that could be procured by interrogatories.

Besides that I believe any act that might be a matter of proof in this case would be subject to the rules of evidence, other than any act which proves itself in the document, which he has. As to that oral proof I say to you today that we will confront them with the names of any and everybody who has any information which we know, and under Rule 26B, which provides for discovery, the defendant, or defendants, have the right to take the testimony, or deposition, of those witnesses and ascertain what they know.

The COURT: From which rule are you reading?

Mr. BRITT: I was stating the rule generally with respect to the duty we have, or do not have, to answer this kind of interrogatory.

The COURT: I see.

Mr. BRITT: Now, taking up Interrogatory No. 14: "Do you contend that the alleged combination and conspiracy is evidenced by any acts of this defendant in participating in the meetings of the Cotton Valley Operators Committee?"

183 Answering that, he has all of the information contained in the document, and it is not necessary for us to place, by way of answer, any interpretation on those documents for him. He can read as well as we. He knows from the documents what they contain. He has the document, and today we will give him the names of any and everybody having other knowledge, and let them tell him what they know, and let him see whether in his opinion, any such act was committed. Otherwise it is only arguing the law in controversy. With the document before him, and with the deposition, or testimony of the witnesses which he can take, I believe under the rule that is all we are called upon to furnish. As your Honor knows, he can secure their testimony, and I think with that information

he can get an order and serve it to take the depositions of these witnesses and find out first hand, not secondhand from us, what they know. As I say, we tell you that we will present him with the names of all of the persons here today whom we know, or believe to have any knowledge of the facts, or any matters concerning this suit.

The COURT: Well, I might say that I have not undertaken in advance of this hearing to consider any of these interrogatories; in other words, what I am hearing now is the first information I have had about the nature of the interrogatories.

Mr. BRITT: Do you think it would be proper then to go over each one separately?

The COURT: Well, I might hear you generally on both sides, and then take them up separately.

Mr. BRITT: Well, that is about what I had to say
184 with respect to the first four groups, which constitute the bulk of the interrogatories that relate to the conspiracy. The first group purport to relate to combination or conspiracy. I should say, looking at the document more closely, the first group relate to alleged combination and conspiracy; the second group relating to alleged monopoly, and the third group relating to alleged price fixing and alleged common selling agent.

The answers to these last three groups would be the same as the answer applying to the first of the groups, which is that if any answer is required to be given in addition to the information which has been furnished to any one of these first ones, it would necessarily answer one or the other of the other groups, because you cannot split up and separate conspiracy.

Now, on page 13 he has what he has designated "Miscellaneous Interrogatories" a majority of them call for our opinion. The first of these, Interrogatory No. 61 asks: "On what date do you contend that the operation of the plant of the CVOC at Cotton Valley, Louisiana, became illegal?" That interrogatory calls for a legal argument. It isn't a question of information.

Our contention is that the operation of the plant was a part of the conspiracy, was one of the means used to effectuate the conspiracy, and if at any time anything was done by the conspirators, any one or all of them during this entire period other than the operation of the plant, which constituted conspiracy, and the plant itself was used in effectuating the conspiracy, then that illegality remained throughout the entire period of time, and you cannot pick

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out a date and say, "This plant was illegal on one date, and legal on another." In other words, if there was a
185 conspiracy, and if the plant was used in the course of the conspiracy, even though it was otherwise an entirely legal operation, it became a part of the illegal conspiracy, so that it is illegal for all times, because it was a part of the conspiracy. Therefore, you cannot answer that interrogatory.

Besides that it calls for a conclusion of law. I cannot state whether it is legal or illegal; that is the question this Court must decide. Why should I be called upon to do that? As a matter of fact legally I cannot do it.

The COURT: Here is what I have running through my mind with respect to conspiracy and monopoly: If you were trying a criminal case and proved conspiracy, then any overt act, whether the entire purpose was accomplished or not, would be sufficient to sustain a conviction for conspiracy.

Mr. BRITT: Yes, sir.

The COURT: Now, on the other hand, insofar as monopoly is concerned, the proof would have to be such that what was done actually resulted in monopoly. In other words, the difference between them is that in the commission of an offense which is conspiracy, when any step is taken to carry the conspiracy into effect, that is proof of the conspiracy; whereas to sustain the idea of monopoly, or the offense of monopoly, under the law you would have to go much further and prove that the acts which were committed did result in a monopoly. What I am trying to say is, there must be some distinction between this type of case you have been discussing in the beginning, and going
186 on into the question of monopoly.

Mr. BRITT: I agree with everything your Honor has said up to this point, but I think your Honor has missed the point in the case itself. The charge in this case is not monopoly.

The Sherman Act, Section 2, deals with monopoly, and if you will read that Act you will see there are three separate ways in which it may be violated. It might be violated by attempting to monopolize, and it does not necessarily include conspiracy to attempt to monopolize. It might be violated by an individual; one person might monopolize an industry. That is different from conspiracy. You have to have two or more persons or corporations involved to constitute a conspiracy, but one person can be guilty of monopoly.

As I say, there are three separate ways of monopolizing, or three separate ways to violate the Sherman Act with regard to monopolies. We have abandoned the other sections, and all that we have here is that they did several acts, and one of them was the attempt to monopolize, and the conspiracy to do that, which is the same as conspiracy to restrict the trade by fixing prices, and appointing a common selling agent. We have not charged them with monopolizing anything. We are charging them with conspiracy to do that which under Section 2 was an attempt to monopolize. We have not charged them with the substantive crime of monopoly.

The COURT: Isn't the plaintiff proceeding under the act which permits of treble damages to the person who has been injured?

Mr. BRITT: Yes, sir.

The COURT: Then incomplete monopoly, in which
187 no damages was occasioned, would hardly be sufficient upon which to award monetary damage.

Mr. BRITT: I think that is absolutely right. However, we are not in the same position as a person, an individual, who should come in under the Act and seek a monetary judgment. We are not seeking any money.

The COURT: You are seeking to get an injunction?

Mr. BRITT: To get an injunction. We were told by the Supreme Court in a case we tried some ten years ago involving certain tire companies that we were not a person, and we could not sue, or stand in the shoes of a person seeking to recover such relief. In that rubber tire case we sought to secure a monetary judgment, but the Supreme Court told us we were not a person, and could not be awarded such relief. Therefore, we are here under a different basis. We are merely seeking an injunction; that is the relief which we will ask for after the case has been turned over to your Honor for consideration.

So I say we are in a different position than an ordinary person. The Supreme Court of the United States has stated that we are in that category.

Now, may it please your Honor, we do not stand on the ground that we are not subject to being asked any questions. We do say that any questions we can answer we will answer, but we should not be required to argue our case either as to facts or law through interrogatories. We will argue our case to the Judge after we have furnished each other all the information we have, and after we

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188 have taken all the evidence we have, and it will be up to your Honor to decide who is right, which side of the controversy is right. However, we should not be required to argue the facts or the law through interrogatories. He is a lawyer; he has as much information regarding the law as we have. That is the position we take. We have given him everything we have, except we will not tell him what we think some persons may testify. We have given him the names of the persons whom we think will back up our contention in the matter so far as facts are concerned. He has the documents already. If he wants any information from these persons let him get it by obtaining an order to take the depositions of these persons and secure that information in a legal manner.

The COURT: You have stated they are entitled to any written statement you have; would not that include statements of witnesses?

Mr. BRITT: To settle that, I state to your Honor now that we do not have any written statements from any person or persons in this case. We do not have any. All of the written documents we have we have furnished to them. We do not have any others that are subject to being produced in this record.

Mr. O'QUIN: To whom do you refer when you say "we"?

Mr. BRITT: I mean the government. I do not have any written statements in my file, or any that I shall put in evidence. I do not know of any. I do not know anybody connected with the case who has any. I have examined

189 every file that has been made available to me, and I have not been able to find a written statement taken from any witness.

Mr. O'QUIN: Will you pardon me?

Mr. BRITT: Yes.

Mr. O'QUIN: Do you mean to tell this court that the FBI did not take questions and answers from witnesses, take them down in writing at the time they took depositions of those witnesses, and that they are not in existence? Do you mean to tell this Court that is true?

Mr. BRITT: I mean to tell the Court that—

The COURT: (Interrupting) Let him finish, Mr. Britt.

Mr. O'QUIN: Are you meaning to tell the Court that the FBI did not question witnesses, and take their answers to the questions, which was done in writing, and that those statements are not in the files of the Department of Justice at the present time?

Mr. BRITT: I will answer that question this way, your Honor: I have some of the reports given to me, but I find no statement that has been signed by any witness in writing. I have some of these reports, which are only the Agents' versions of oral statements which they took from witnesses, which have not been submitted to the witnesses, and which constitute no sort of proof of anything except the version of the FBI agent who had the interview. It is thoroughly understood that an FBI agent, in making such reports, constitute nothing other than an interrogator, an investigative agent, of the Attorney General. They have interviewed persons, and took oral statements from them,
190 which statement constitute nothing more than the statement of that particular agent, giving his version of what the witness said to the Attorney General, through his agent. That could in no manner constitute a statement of the witness which would be admissible in any court in the United States. There is not one single signed statement by any witness in these trials. If any witness takes the stand and made a statement we could not put the FBI agent on the stand and say, "Did not he tell you thus and so, or did not he say that?" I do not intend to even attempt to do that I know it could not legally be done.

Now, if we had the signed statement of any party, and that party took the stand and made a different statement, we could confront him with that statement and ask him if he signed it, and if it was true and correct, and if he in any way denied it, we could put the agent on and prove that the man gave such statement freely and voluntarily, and signed it after reading the document over. That is not true with regard to any statement we have at the present time. All we have is a memorandum of an interview of a witness, which memorandum was made by an agent of the Attorney General, and which memorandum could not in any manner be used in the trial of this case.

The COURT: Well, let's analyze this situation a little. We all know that the most prevalent method of impeaching a witness is to prove that he made a prior statement on some former occasion contrary to the statement he makes on the witness stand. For instance, if he takes the stand and swears in a certain manner, and you know of a witness with whom he has had a previous conversation regarding the matter, even if no record is made of that conversation,
191 you may impeach the witness on the stand by warning him, and putting him on notice of the time and

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place where and when he is supposed to have made a different statement, and ask him about that statement. Then if he denies having made it, even where there is no written record made, no signed statement taken, you can put the other witness on the stand and impeach him.

Now, then, I do not know of any rule which would excuse an FBI agent, or anyone else, who had interviewed a witness, and had himself written down what that witness said, from being called for the purpose of impeaching that witness. The mere fact that the statement is not signed does not make it any different, it seems to me, than would be the situation where you had any other witness to whom the present witness had made a statement, who could be called for the purpose of impeaching the present witness if he denies having made a certain statement, after having been put on guard and warned by stating the time and place and the approximate words he is supposed to have used.

Mr. BRITT: I thought perhaps that would dispose of the question, by stating what I have with regard to documents that could be used in any manner as evidence in the case. Mr. O'Quin asked me if we had any statements from witnesses. I said we do not. I thought that would make it perhaps satisfactory with him by stating that we had none signed by the witnesses.

The COURT: Well, I think that any documents or statements which are pertinent to the case, and on which you rely, must be produced here. Now, confidential communications between counsel and client, or any other confi-
192 dential matter of the nature I have previously mentioned, is an entirely different thing, but if you took written statements, or if you intend to use any of the agents to rebut the testimony of any witness, it seems to me, just shooting from the hip not having time to look up any cases on it, would have to be produced.

Mr. BRITT: As I read the Hickman vs. Taylor case, it is a case where a lawyer was held in contempt, which was brought about by his failure to produce some of the statements of witnesses which he had obtained, some of the information which he had obtained in the course of preparation for trial—

The COURT: (Interrupting) Do you think the opinion in that case is very clear?

Mr. BRITT: Yes, your Honor, on some points, particularly with respect to where a lawyer has investigated his case himself.

The COURT: Well, if you can differentiate from that opinion just what was held and what was not held you are a much better Judge or lawyer than I am.

Mr. BRITT: I think Mr. Justice Jackson cleared it up in his comparing opinion, and here is what he said:

"Counsel for the petitioner candidly said on argument that he wanted this information to help prepare himself to examine witnesses, to make sure he overlooked nothing. He bases his claim in his brief on the view that the Rules were to do away with the old situation where a lawsuit developed into 'a battle of wits between counsel.' But a common law trial is and always should be an adversary
193 proceeding. Discovery was hardly intended to enable a learned profession to perform its function either without wit or on wits borrowed from the adversary."

The COURT: Does that mean anything to you with regard to what can be produced, or what cannot be produced?

Mr. BRITT: Yes, sir. I think it means this: That when a lawyer goes out and prepares his case he is entitled to have some degree of protection in the work that he does.

The COURT: As I remember the language of that decision, they simply meant to say that a lazy lawyer cannot sit down and do nothing and expect to make the other side produce all of his evidence. That is about what it amounts to.

Mr. BRITT: Yes, but when you get into the question of license you get into degrees of license. We submit there should be some stopping point. We have offered the other side everything the rules call for us to give them in the way of evidence, and we are going to furnish them with all of our documents, and now they want us to give them our opinions with regard to what the documents themselves mean, in addition to which they want us to give them the information they request with regard to what our witnesses may say when and if placed on the stand. We do not think the rules go that far. If we had written signed statements of witnesses, perhaps the rule would cover the production of them, but it is going pretty far afield to say that we have to give to them statements made, not by the witnesses themselves, but by agents of the Attorney General who interviewed the witnesses and wrote up written reports of the interpretation of the agent of what the
194 witnesses may have told them. Frankly, if your Honor pleases, I do not think the rules ever contemplated any such thing as that, and I believe that is what

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Mr. Justice Jackson meant in his concurring opinion with regard to what your Honor has termed "lazy lawyers". They have the documents; they will have the names of the witnesses. They can get the information they seek from the witnesses under proper court order, and, instead of asking us to interpret what they mean by what they say, they, being lawyers, can place their own interpretation on what the witnesses say.

The COURT: Well, let's analyze the situation a little further.

Suppose you had a situation where a witness who was a party to the case, or who had been interviewed by the FBI, or anybody else, at which time no signed statement was taken, but the agent of the FBI had taken a written statement, that is had made a written statement of what the man had told him at the time he interviewed him. Now then, let us suppose that the witness takes the stand and hedges on what he told the FBI agent, and testifies diametrically the opposite on the trial of the case. The FBI agent, without being compelled to produce anything, any record, at the time except his recollection, is called on the witness stand. Would it be true that under those circumstances the other side would be compelled to take the memory of the FBI agent on the things the witness had told him, or would the other side be entitled to have what the FBI agent had written down as the man's statement at the time for the purpose not only of proving the contrary of what the witness testified to, but refreshing the memory of the FBI agent himself as to what he
195 said on that occasion to him. Since the ordinary rule is that a witness can be contradicted by a statement previously made by him, after having been put on guard, or notice, could the bare memory of the FBI agent, who handles many cases in the course of a year, be relied upon, or should it be accepted without support, or would not his written report, corroborating his statement of what the witness had told him be better?

Mr. BRITT: I am not prepared right now to answer that question without further research, if your Honor pleases, but when a witness makes a statement under oath, then in order to impeach him must it not be shown that the other statement was made under oath?

The COURT: No, sir, I mean under circumstances where any contradictory statement, under other circumstances, has been previously made, and the party to whom it was

made, or a party who may have heard it made, is allowed to take the stand and contradict, or impeach him.

Mr. Britt: Well, frankly, I am not prepared to answer you on that point right now.

The Court: Well, I have ruled on situations similar to that hundreds of times since I have been on the bench, and I do know that in a criminal case you can impeach a witness that way.

Just thinking out loud—and I am not prepared at this moment to pass on the question—I might give my impression at the present time of the way the situation appears to me. As I have stated before, I have not undertaken to examine the interrogatories, and do not know anything about what they call for, but I will give you my im-
196 pression at the present time, which is not binding on me, but I think you gentlemen are entitled to know what is going through my mind in order to properly present your side of the case on each side, it is my impression, that each side will have to produce any contract or statement, or things of that kind, as to the facts, but when you get into the realm of asking for contentions and opinions and conclusions, those are things that the Court will have to decide, and counsel can be thinking about it in his argument generally.

Mr. Britt: Well, I have stated my understanding, and our position in the matter, if your Honor pleases.

The Court: Well, as I say, without having had time to investigate the law, having had this matter presented to me fresh today for the first time, my general impression with regard to these matters is as I have just stated it. If you can produce any cases to the contrary I shall be glad to see them, and will be glad to read them.

Mr. Britt: Shall I proceed?

The Court: I think I have your position fairly well in mind, Mr. Britt, so I think I should hear the other side generally on the proposition you have been discussing.

Argument on Behalf of Magnolia Petroleum Company

Mr. Wallace: May it please the Court, the way I see the background of these interrogatories briefly is this:

My client has filed an answer in this case, and we are trying to get ready for trial. We have made requests, or given notice, to take depositions, of course, almost a year ago, and as a part of our grounds for this discovery, it is necessary for us to get certain information on which to

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base interrogation on discovery, so that we could
197 get our answer filed, and our case ready for trial.

Now, we have been thwarted from taking depositions, and we are met by exceptions of the government on every motion, and on every attempt that we make in any and every manner to obtain the information we are entitled to have in order to properly defend this lawsuit.

I would like to just merely quote a few words from Rule 26 (b):

"Unless otherwise ordered by the Court as provided in Rule 30 (b) or (d), the deponent may be examined regarding any matter, not privileged, which is relevant to the subject matter involved in the pending action, whether relating to the claim or defense of the examining party or to the claim or defense of any other party, including the existence, description, nature, custody, condition, and location of any books, documents, or other tangible things and the identity and location of persons having knowledge of relevant facts."

Then the concluding sentence reads:

"It is not ground for objection that the testimony will be inadmissible at the trial if the testimony sought appears reasonably calculated to lead to the discovery of admissible evidence."

Now, the Magnolia Petroleum Company is only one of almost two score defendants in this case. We are right in the midst of a large group of companies whose interests in that section are so much greater than those of the Magnolia that those of the Magnolia become almost insignificant. But my client is grouped with forty odd others, and we are charged with some kind of conspiracy. We have got to defend ourselves.

I think, if your Honor pleases, that the Magnolia
198 occupies a peculiar position, and, in explanation of that, I will say to your Honor that we have, I expect, about five or six percent interest in the leased acreage there. So your Honor can see that we are not big operators there. Unfortunately, however, we are thrown into this lawsuit with the others, are charged with being conspirators, and must defend ourselves to the best of our ability.

It is our theory that everything was all right up until about September 13, 1945, at which time CVOC, Cotton Valley Operators Committee, voted to process the remaining distillate that was processed at that plant. Up to that time, so far as our information goes, only the distillate was

processed from the CVOC plant at Cotton Valley, Louisiana, but on September 13th, 1945, although a majority of the members of the Committee voted to convert that plant, or change its operations, so that instead of distillate being one of the end products, there were other allied products, such as kerosene, gasolene, naptha, solvents, and so forth, petroleum products.

Magnolia did not vote for that change in processing at that time, or any other time. In fact we voted against it. We have voted against it since then, and we would vote against it today. This is not based on our claim that such conversion or change was illegal, nor was it based on the fact that such change or conversion would not be financially profitable to the operators, but the vote of the Magnolia against it was based solely upon business reasons of it own, based in part on its belief that this conversion would or might likely result in unusual quantities of somewhat inferior gasoline being put on the market in North Louisiana area.

199 But the most puzzling thing in this whole business is this: Magnolia Petroleum Company is named as one of some thirty or forty persons who conspired to monopolize. In the Government's Second More Definite Statement they say that these defendants here—and that includes the Magnolia Petroleum Company, by entering into this conspiracy and combination, have brought about a result of unreasonably restraining and monopolizing commerce, to the detriment of even this defendant, Magnolia Petroleum Company. Taking these pleadings as they stand now, Magnolia Petroleum Company is charged with conspiring with others against itself.

So we occupy a very peculiar position in this situation. We are conspirators, Magnolia Petroleum Company against Magnolia Petroleum Company, and that is one of the reasons that we have directed these interrogatories to the Government, in an effort to be able to plead and show that the Magnolia Petroleum Company never entered into a conspiracy against itself.

We think under this situation there is in this lawsuit more than there is in the usual lawsuit, and that we are entitled to more than just the usual pleadings, your Honor. We are entitled to answer under that—I mean to get answers under our interrogatories as to why they believe, or why they are charging, or why they are claiming under 26 (b) that the Magnolia Petroleum Company is conspiring

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with itself, and we are entitled to get answers to these questions which are definite, and not general in character. We must have information as to the specific offense the Government relies on to convict the Magnolia Company of violating the Anti-Trust Laws of the United States. It is, therefore essential to this defendant to know the exact evidence which the Government relies on in order to adequately prepare its case for trial, and to avoid surprise and motions for continuance during the course of the trial.

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Now, counsel for the Government has stated what he had in his files. My files here, and in Dallas, Texas, to which the Government has had access, establish this: That we have made a studied effort going back at least three years trying, by interviewing every employee of our company, every man here and elsewhere, whether he is with our company now or not, who was ever connected with the company trying to see what they know, and what they did, which could in any manner connect the Magnolia Company with any conspiracy. We have, as I have stated, tried to interview all of the witnesses. We have tried to interview all of the alleged co-conspirators, trying to find some basis, some something, some telegram, some letter, or some document, or some statement, whereby we could be connected with a conspiracy at some time or some place. Our files do not disclose anything directly, or indirectly, which would inform my client that it ever had anything to do with any conspiracy, in any form, under any circumstance, or otherwise.

This court already knows that a treble damage suit is contemplated by the Premier Oil Refining Company, which may involve as much as from Ten to Fifteen Million Dollars. Under these circumstances, and in view of the fact that the Government has had its Investigation Department, the FBI, here for four or five years—certainly since 1945—they had had the benefit of all the records and information furnished them, and my client is entitled to find out what the Government has against it, or alleges to have against it.

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For these reasons we have asked these interrogatories here. At least we want them to be consistent, and their pleadings are not. We ask them to swear under oath how and in what manner the Magnolia Petroleum Company was ever a part of the conspiracy. They charged it in one part of the pleadings, and in another part they say that

we are one of the injured parties from this conspiracy. If we are a victim of a conspiracy we could not be a party to the conspiracy, and we would like to get this question settled once and for all. We are here at least once a month, and have been here for a considerable time, meeting different pleadings the Government has filed, and we have to meet them whether we want to or not.

Therefore, we have filed these interrogatories, and ask these questions, so that the Court could require them to swear under oath whether we are fish, or whether we are fowl. We think that they should be made to answer them under oath, so that we can have something to bind them down to, in order that we can prepare our case. We think the Government is required to give us that information, and if that information shows on its face that we are not a proper party to this suit, then we can come in with a motion for summary judgment, if your Honor agrees with the position we take, then so far as the Magnolia Petroleum Company is concerned it can be dismissed from the suit, go on about its business, and not have to spend a lot of time and a lot of worry preparing a defense in this case

If that can be done now, there is no reason why we
202 should have to go through a long, lengthy trial, and then have the case thrown out so far as my client is concerned.

Furthermore we need this information in order to adequately apprise ourselves of the actual offenses charged, and the evidence relied upon by the Government, none of which this defendant has in its possession at this time, so that if a summary judgment is not in order, then we can be prepared at a preliminary hearing, or a pre-trial conference, to get at just exactly the facts which will be allowed in the record, and which facts might be stipulated, all of which would materially shorten and expedite the trial.

I submit, may it please the Court, that the offenses alleged against the Magnolia Petroleum Company have been and are in general terms; there has been no evidence pleaded on which the Magnolia could adequately be advised of what the Government really expects to prove against it. That is the purpose of these interrogatories.

I further submit, if your Honor pleases, that this is a conspiracy case, and is just another of the current group of mass trials which have been and are now in progress throughout the country, and if the Government is not re-

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quired to give this defendant the information which it now seeks, its rights, and its position will be, or most likely will be, lost in a group trial of almost two score defendants.

On the other hand, if the Government is required to answer these interrogatories of this defendant, then this defendant can show its position and can demonstrate to the Court that it occupies now, and has always occupied at all times, a peculiar position in its relation to Cotton
203 Valley Operators Committee. We think we are entitled to this information, and we are not making an arbitrary demand. We are making a demand which we are legally entitled to have filled. We are not asking for any questions of law; we are asking them simply to give us the bases on which the Magnolia Petroleum Company is charged, and on which it is claimed that my client is a part of an alleged conspiracy. When that is done then we will know what is what. If the Government is coming in here and making these grave charges based on only rumors, then we should know it now and have this lawsuit thrown out.

Now, he says that he has furnished us some things. The facts there are these: We asked for copies of leases, or instruments, which the Government had taken, and as to some of them they gave us a list of those instruments that they had photostated as exhibits. Well, they went and examined all of our records, and we do have photostats of those they photostated, but at the same time they went to perhaps a half dozen witnesses, and those witnesses had documents in their offices, which they may have photostated I don't know whether they did or not—but we have no way of knowing whether or not the Government has furnished us with all of these instruments. We do have some of the photostats that the Government took from our files, but they went to other alleged conspirators in this case, and they took documents from their files, and we think that if we could get copies of those documents we would be able to show, beyond any question of doubt, that there is no conspiracy that would lie against the Magnolia Petroleum Company. There may be a whole mass of stuff that they photostated and that they have in their files.
204 There is only one contract, as far as I know, and that is the Cotton Valley Operators Committee contract. There may be some sales contracts. We would like to know out of that mass of stuff what specific items they expect to rely on in attempting to establish my client as a co conspirator, or otherwise.

Now, they say that they will give us the names of witnesses. I submit that they have objected to giving any names of any witnesses. They say they will give us the names. We think that they should be made to tell us what they expect to prove by these witnesses. This court knows from the defense in this case, or rather from the offense charged in this case, and general complicated nature of it, that there are some hostile witnesses to the Magnolia Petroleum Company and the other defendants in this case. We are not going to have any luck going to those people getting any statements. In other words, as far as us getting any information from them by going to them and interviewing them we would be wasting time. Therefore, we submit may it please the Court, the Government should be forced to tell us at this time what they expect to prove by those witnesses, because the Government has that information in its possession, and we cannot get it by going to them and asking them for it. Remember there is a fifteen million dollar lawsuit in contemplation against us, and those witnesses are not going to do much talking to us, no matter how much we interview them. The Government has been interviewing all the witnesses it could find for a period of at least three years, and they know the name and addresses of all of those witnesses, and exactly what they expect those witnesses to testify. We submit that if the plaintiff
205 waits until just before the trial of this case to submit those names it will be impossible for us to interview them, even if they are willing to talk. Furthermore, as I have previously stated, they are probably representatives or employees of either the Woodley Petroleum Company, or the Premier Oil Refining Company, and if we had the names of them we could get nothing from them anyway. They would be adverse witnesses; therefore, we ask that the Government be required to give us any oral statement or written statements they have from these witnesses.

Now, with regard to the charge of price fixing, we are going to contend, if this case ever goes to trial with us in it, that this defendant never designated anyone as a common sales agent for its products produced from the Cotton Valley plant, but that it interpreted the unitization contract as giving a title to its products in kind at some stage of the operation, and that it did sell its products through a decision arrived at by it independently; that it finally determined the price to be paid, to whom it sold such products, and that title passed through its own contract, and not through the contract or act of any common selling agent,

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with a possible few exceptions, and under emergency conditions. Therefore, this defendant, claiming that it has always and is now selling its own products in kind, states to the Court that it is essential to the proper presentation in this case for this defendant to know exactly what actual facts the Government relies upon in its charge of combination through sale by a common selling agent.

We do not know anybody else who has had a common selling agent, or of any sales through a common sell-
206 ing agent. We think we are entitled to this information, so that we can meet that issue at the proper time.

Now, if your Honor pleases, I submit that each and every one of these interrogatories come squarely within Rule 33, and particularly Rule 26 (b) referred to in Rule 33, in that the scope of this examination relates to the claim of the Government, to the defense of the Magnolia Petroleum Company, and to the existence, description, nature, custody, condition, and location of any books, documents, or other tangible things, and the identity or location of the persons having knowledge of such facts. We do not want to be put in the attitude in coming here some Monday morning to begin the trial of this lawsuit with thirty-three other defendants in it, involving millions and millions of dollars, and have the Government bring in some surprise witnesses, or surprise documents, which we have not had opportunity to investigate to prove the untruthfulness of them. We want that information right now.

They say that we can get this information by taking depositions. Well, we have tried to take depositions, and we will probably try to take some more depositions. But every time that we attempt to do anything in this case to get any information from the plaintiff in the case we are met with a blockade, with a solid wall. In comes counsel for the plaintiff with some pleading to cut us off. I think we are proceeding properly at the proper time, and the whole situation can be solved by the Government simply going ahead and doing what it should do, answering truthfully the interrogatories which have been propounded to them. That would solve the whole trouble in just about fifteen minutes.

207 Why should the Government seek to withhold this information? They have come in here and charged my client with a very serious charge, conspiracy and monopoly. Why shouldn't we be afforded at least some information on the charge, or with respect to the charge, so

that we may properly prepare ourselves for a defense. All we want is information upon which we can base our defense in this case, so that when it comes to trial we won't be in here forced to ask for a continuance of the trial.

So we respectfully submit their motion should be overruled, and that they should be required to answer each and every one of these interrogatories in order that we may immediately proceed with our preparation to get this case ready for trial by October, and be able to meet the issues when that time comes.

The COURT: Let me have that rule to which you referred.

Mr. WALLACE: It is 26 (b).

Ruling on Interrogatories

The COURT: The situation presented by this lawsuit is not an ordinary one in the sense that it is a complaint about a specific matter, or claim for money due on a contract, or something of that sort, and denial by the other side that it owes it, but this case is based upon a complicated set of facts. It is based upon a complicated set of allegations, in which conspiracy is alleged, involving refining operations, transportation and sales operations, all of which, it is alleged, are apart of the conspiracy to prevent others from participating in, or deriving any benefits from the subject matter of that conspiracy, which was the production of the Cotton Valley field.

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It also involves a large number of defendants, who, presumably, from the magnitude of their operations—and I think the Court may take cognizance of the fact that companies like the Magnolia, or other companies of that magnitude, are operating generally, not only here, but in other localities, and have their books and records, and things of that sort, in different cities, and different localities, and when you lump together a large number of persons like that, or corporations like that, and necessarily are going to rely upon evidence obtained from all of them, or at least many of them, in making out your case, it makes it hard for the individual corporation to get sufficient information which it does not have in its own files on which to base a defense.

As counsel for the Magnolia points out in this case, it is entirely possible that the Government in the course of this investigation, growing out of which it has charged a conspiracy against all of these defendants, did thoroughly investigate all of the books and records, and so forth, of each and all of them, and the individual defendant, corporate

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defendant, cannot be presumed to have in its possession copies of all of those documents which might have come from their co-defendants in this suit, and except for the records which that corporation may have in its own files, and except for the individual witnesses who may be employed by it, it does not have the information that has been obtained by the Government from a conglomerate mass of information owned, or in the possession of all of the defendants, and any one particular defendant, therefore, might know nothing about the record, or witnesses,
209 that some other individual defendant might have, and might be able to produce on the trial of the case.

For these reasons it is essential that there be quite a wide latitude allowed, I think, for the purpose of finding out just what it is all about, and finding out the facts—not the opinions or conclusions of counsel in the case—as to what it all means. I think each defendant is entitled to know what the facts are upon which the Government relies, and I think the present counsel, Mr. Wallace, is entitled to have as many of these interrogatories answered as the plaintiff can possibly answer, because his client is charged as a co-conspirator in this matter.

Now, counsel for the Government has, in response to an order which was made by this Court, stated that they have given, or will give the names of the persons who have been interviewed, and upon whose testimony the plaintiff relies, and I think the defendant Magnolia Petroleum Company is entitled to that information. Of course I don't know, but it is entirely possible the Magnolia could have entered into the conspiracy originally, and then decided to withdraw and not assume any responsibility for any further activity, and then later on become the victim of the conspiracy. That is not impossible, but, as counsel has stated, if he has read the pleadings correctly, the Government certainly cannot hold the Magnolia as a co-conspirator and then claim that the Magnolia is a victim of the conspiracy.

On the other hand, I believe there is a limit to the character of the interrogatories that might be propounded. This rule reads: "Scope of Examination: Unless
210 otherwise ordered by the Court as provided by Rule 30 (b) or (d), the deponent may be examined regarding any matter, not privileged, which is relevant to the subject matter involved in the pending action, whether relating to the claim or defense of the examining party or to the claim or defense of any other parties, including the existence, description, nature, custody, condition, and loca-

tion of any books, documents, or other tangible things and the identity and location of persons having knowledge of relevant facts."

I think that the best way I can handle this, because I am put in the position more or less of having to shoot from the hip today, would be to take these paragraphs up and go over them one by one and rule on each as to whether it will be allowed or denied. I do not know any other way it can be disposed of at this time in order to allow you people to go ahead and get this case ready for trial, so I think I shall take them up and go over them and make my ruling on each one as we proceed.

The first one is: "Do you contend that the alleged combination and conspiracy is evidenced by any written contract or contracts to which this defendant is a party?"

That includes only written contracts which can be produced, on which the plaintiff relies, so I think that objection to No. 1 should be overruled.

No. 1-A: "If so,what is the date of such contract or contracts, what is the substance thereof, and what other parties executed it?"

This information will be required in answer to the interrogatory by the production of the documents themselves in order that counsel may have the benefit of copies thereof.

211 No. 1-B: "If so, what parts of said contract or contracts do you contend evidence such alleged combination and conspiracy?"

I think that involves interpretation of the facts. You are entitled to the facts, but I don't think you are entitled to the legal interpretation of them by counsel, so No. 1-B will be denied.

Interrogatory No. 2. "Do you contend that the alleged combination and conspiracy is evidenced by any oral contract or contracts to which this party is a defendant?"

That Interrogatory will be allowed.

Interrogatory No. 2-A: "If so, what is the date of such contract or contracts, what is the substance thereof, and what other persons were parties thereto?"

No. 2-A will be allowed.

No. 2-B: "If so, what parts of said contract or contracts do you contend evidence such alleged combination and conspiracy?"

That will be denied for the reasons above stated.

Interrogatory No. 3: "Do you contend that the alleged combination and conspiracy is evidenced by any letters sent by this defendant?"

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That involves a question of fact as to whether there was any such letter, or letters and that might be answered by production of any such letter on motion to produce any documents which the Court would order produced, but I will limit that to the production of the letter itself.

INTERROGATORY No. 3-A: "If so, what are the dates of such letters, what is the substance thereof, and to whom were they sent?"

212 That will be allowed, with the alternative that you produce the letter itself, which will speak for itself.

INTERROGATORY No. 3-B: "If so, what parts of such letters do you contend evidence such alleged combination and conspiracy?"

That will be allowed, with the same alternative.

INTERROGATORY No. 4: "Do you contend that the alleged combination and conspiracy is evidenced by any letters sent to defendant?"

That will be granted, with the same alternative of producing the letters themselves.

No. 4-A: "If so, what are the dates of such letters, what is the substance thereof, and by whom were they sent?"

That will be allowed with the alternative of producing the document itself.

INTERROGATORY No. 4-B: "If so, what parts of such letters do you contend evidence such alleged combination and conspiracy?"

That will be denied for the reason stated before.

INTERROGATORY No. 5: "Do you contend that the alleged combination and conspiracy is evidenced by any telegrams sent by this defendant?"

That will be allowed in the same sense, that is to answer it or produce the telegrams.

INTERROGATORY No. 5-A: "If so, what are the dates of such telegrams, what is the substance thereof, and to whom were they sent?"

Same alternative ruling in that case.

INTERROGATORY No. 5-B: "If so, what parts of such

213 telegrams do you contend evidence such alleged combination and conspiracy."

That will be denied.

INTERROGATORY No. 6: "Do you contend that the alleged combination and conspiracy is evidenced by any telegrams sent to this defendant?"

That will be allowed in the same way I suggested before.

INTERROGATORY No. 6-A: "If so, what are the dates of such telegrams, what is the substance thereof, and by whom were they sent?"

Same ruling, with the alternative, as in the other cases.

INTERROGATORY No. 6-B: "If so, what parts of such telegrams do you contend such alleged combination and conspiracy?"

That will be denied.

No. 7: "Do you contend that the alleged combination and conspiracy is evidenced by any conversation to which this defendant, its officials, agents, servants, attorneys or employees were parties?"

Answer will be required to No. 7.

INTERROGATORY No. 7-A: "If so, give the time, place, substance, and names of persons participating therein?"

That is allowed.

INTERROGATORY No. 7-B: "If so, what portions of said conversation do you contend evidence such alleged combination and conspiracy?"

I think that is a little different to the question of interpretation of these documents—no, I am on the wrong interrogatory—that is 7-B, which will be denied.

214 INTERROGATORY No. 8: "Do you contend that such alleged combination and conspiracy was entered in to by any officials, agents, servants, attorneys or employees of this defendant?"

Now, that is the one where I think there is a little difference between an interpretation of these documents, and I think that No. 8 should be answered.

No. 8-A: "If so, give their names and addresses."

No. 8-A will be allowed.

No. 9: "Do you contend that this alleged combination and conspiracy was the result of any overt act of these defendants?"

That is on a question of fact, and that will be allowed.

No. 9-A: "If so, what act or acts are relied upon? Give the name, nature and substance of each and the names of the officials, agents, servants, attorneys and employees of this defendant participating therein."

This will be allowed. That, in some sense, involves an interpretation of an act, but at the same time it includes the question of fact as to the matters therein called for, as to the parties who did it, who, as a matter of fact, consti tuted the participant in the conspiracy.

No. 10: "What are the names and addresses of all the witnesses by whom you expect to prove the alleged combination and conspiracy entered into by this defendant?"

That is one of these all inclusive interrogatories, which requires the plaintiff to name all of the witnesses who will

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be introduced in the case, but as to whether they would be bound by such list on the trial, I do not know.

215 Mr. BRITT: I have already offered to give him the names of the witnesses.

The COURT: All right then, let that be allowed.

INTERROGATORY No. 10-A: "Briefly and succinctly, what do you expect to prove as against this defendant by each?"

Mr. BRITT: Now, if your Honor pleases, we object to that one especially.

The COURT: I do not think that you are required to tell everything all of your witnesses will testify to.

Mr. BRITT: At the present time we could not answer it.

The COURT: I think that one will be denied.

No. 10-B: "What written statements have you obtained from those whom you expect to use as witnesses?"

I suppose that will be allowed.

No. 1 under that same heading: "Briefly and succinctly, what is the nature of each?"

If the statement is produced and furnished then there would not have to be a description of its contents, and it is not, as I understand it, a question of fact; it is the document itself, which shows for itself, so I will make the same alternative ruling as to this interrogatory that I did to the other interrogatories.

INTERROGATORY No. 10-C: "What oral statements have you obtained from those whom you expect to use as witnesses?"

That will be allowed.

216 INTERROGATORY No. 1 under 10-C: "Briefly and succinctly, what is the nature of each?"

Same ruling as was made with respect to the other alternative answers in the event they produced the documents.

No. 11: "What inference do you rely upon and will you rely upon to establish that this defendant entered into the alleged combination and conspiracy?"

That will be denied.

Mr. BRITT: I did not hear No. 10-C; what was the ruling on that?

The COURT: That will be allowed.

Mr. BRITT: In other words, after I have furnished him with the names of the witnesses he wants to know what oral statements they have made to me? I have talked with several people since I have been here, and I have oral statements from them in my mind, but I don't know what I can do about that.

The COURT: Just do the best you can. You can't do the impossible.

No. 11: "What inferences do you rely upon and will you rely upon to establish that this defendant entered into the alleged combination and conspiracy?"

That will be denied.

No. 12: "What circumstantial evidence do you rely upon and will you rely upon to establish that this defendant entered into the alleged combination and conspiracy?"

217 Well, that seems to call more for an opinion than it does for any facts. It seems to involve more of an interpretation than it does facts. In other words, it requires a compilation and interpretation of the evidence itself, so that will be denied.

No. 13: "What acts or declarations of the co-defendants of this defendant or alleged co-conspirators of this defendant, whether parties or not, do you rely upon to establish that this defendant entered into the alleged combination and conspiracy?"

That seems to call for an interpretation of the testimony itself, but still I am inclined to think it is admissible. No. 13 will be allowed.

No. 14: "Do you contend that the alleged combination and conspiracy is evidenced by any acts of this defendant in participating in the meetings of the Cotton Valley Operators Committee?"

That calls for an interpretation of the acts themselves, rather than any request for fact, so No. 14 will be denied.

Mr. WALLACE: We are asking them for what acts, or on what acts they relied.

The COURT: I guess that might be construed to be substantially what I have just said you could ask them. I will change my ruling on that; No. 14 will be allowed.

No. 14-A: "If so, what are the dates of such meetings, what acts are relied upon, and what participation did this defendant take therein?"

No. 14-A will be allowed.

No. 15: "Do you contend that the alleged com-
218 bination and conspiracy is evidence by any minutes or resolutions of the Operators Committee?"

No. 15 is allowed.

INTERROGATORY No. 15-A: "If so, what are the dates of such minutes or resolutions, and what part thereof do you contend evidences such alleged combination and conspiracy?"

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This will be allowed, but the plaintiff will not be required to interpret the effect.

Now, the next heading is: "Interrogatories Relating to Alleged Monopoly," and No. 16 thereunder reads:

"Do you contend that the alleged monopoly is evidenced by any written contract or contracts to which this defendant is a party?"

That will be answered.

Mr. Britt: If your Honor pleases, this is a group now which I explained before is in the same order as the class that we have just gone over. There is no monopoly alleged as such, but the allegation is conspiracy to monopolize. I have explained the difference between these allegations, and what counsel is attempting to say.

Now, after I have furnished them with any amount of these contracts, they would be the same contracts, and those contracts would be the answer to these questions as well as to the questions that we have already gone over.

The Court: Let's hear the other side.

Mr. Wallace: As I understand the charge, it is that we were attempting to monopolize, in Interstate Com-
219 merce, the activities of this field. In their second amended more definite statement they have charged that the effect of this conspiracy was to eliminate various people from the field, and they have set out allegations here that would, in effect, mean a monopoly, so no matter what counsel claims his pleadings mean they speak for themselves.

The Court: How does that gibe with your contention?

Mr. Britt: Well, conspiracy is the offense, and where it happens to monopolize it means a combination and conspiracy to monopolize.

The Court: Doesn't it say "monopolize"?

Mr. Britt: No, sir, we have alleged certain facts of combination and conspiracy to restrict and monopolize Interstate Commerce, but the primary charge is conspiracy.

The Court: Well, I apprehend that you are going to attempt to show that they, in effect, while attempting to monopolize actually did monopolize; otherwise I don't see how you are going to prove your case. This happened over a period of years, and if they were conspiring to do the acts you claim that they did, if it was a conspiracy to monopolize I don't see why the results wouldn't have been just that in that three or four years when you alleged the conspiracy was in operation. So, as I see it, you will have to prove monopoly, or attempt to prove monopoly. It doesn't appear to me that there is any distinction there.

What I am concerned in now is finding out from counsel on either side the extent to which my ruling should go, and I think the wording of this means that there was an actual operation of conspiracy to monopolize.

220 Mr. WALLACE: Yes, sir, and what we want to know from him is what persons he is relying on to show that, and by what method he intends to prove it, and whether or not these contracts, or any contract, according to his contention, showed that.

The COURT: Under No. 16 I take it that you are referring to the same contract or contracts that were produced under the first series?

Mr. BRITT: That is what I was saying, may it please the Court; that our answer there would have to be the same.

The COURT: Well, No. 16 will be allowed.

No. 16-A: "If so, what is the date of such contract or contracts, what is the substance thereof, and what other parties executed it?"

That will be allowed.

No. 16-B: "If so, what part of such contract or contracts do you contend evidence such alleged monopoly?"

No. 16-B will be denied.

No. 17: "Do you contend that the alleged monopoly is evidenced by any oral contract or contracts to which this defendant is a party?"

That will be required to be answered, just as similar interrogatories under the other headings.

17-A: "If so, what is the date of said contract or contracts, what is the substance thereof, and what other persons were parties thereto?"

17-A will be allowed.

17-B: "If so, what parts of said contract or con-
221 tracts do you contend evidence such alleged monopoly?"

17-B will be denied because that calls for an interpretation of the plaintiff or his counsel.

18: "Do you contend that the alleged monopoly is evidenced by any letters sent by this defendant?"

Allowed.

18-A: "If so, what are the dates of such letters, what is the substance thereof, and to whom were they sent?"

Allowed.

18-B: "If so, what parts of such letters do you contend evidence such alleged monopoly?"

This will be denied because it asks for an interpretation.

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19: "Do you contend that the alleged monopoly is evidenced by any letters sent to defendant?"
Allowed.
19-A: "If so, what are the dates of such letters, what is the substance thereof, and by whom were they sent?"
Allowed.
19-B: "If so, what parts of such letters do you contend evidence such alleged monopoly?"
This is not allowed, because it asks for an interpretation.
20: "Do you contend that the alleged monopoly is evidenced by any telegrams sent by this defendant?"
Allowed.

20-A: "If so, what are the dates of such telegrams,
222 what is the substance thereof, and to whom were they sent?"

Allowed.
20-B: "If so, what parts of such telegrams do you contend evidence that alleged monopoly?"
This is denied.
21: "Do you contend that the alleged monopoly is evidenced by any telegrams sent to this defendant?"
Allowed.
21-A: "If so, what are the dates of such telegrams, what is the substance thereof, and by whom were they sent?"
Allowed.
21-B: "If so, what parts of such telegrams do you contend evidence such alleged monopoly?"
This is denied. This is similar to the others in the sense that it is not asking for facts, but is asking for an interpretation.
22: "Do you contend that the alleged monopoly is evidenced by any conversations to which this defendant, its officials, agents, servants, attorneys or employees were parties?"
Allowed.
22-A: "If so, give the time, place, substance, and names of persons participating therein."
Allowed.
22-B: "If so, what portion of said conversations do you contend evidence such alleged monopoly?"
This will be denied, because it calls for an interpretation.

223 23: "Do you contend that such alleged monopoly was entered into by any officials, agents, servants, attorneys or employees of this defendant?"

Allowed.

23-A: "If so, give their names and addresses?"

Allowed.

24: "Do you contend that this alleged monopoly was the result of any overt act of this defendant?"

Allowed.

24-A: "If so, what act or acts are relied upon? Give the times, nature and substance of each and the names of the officials, agents, servants, attorneys and employees of this defendant participating therein."

Allowed.

25: "What are the names and addresses of all of the witnesses by whom you expect to prove the alleged monopoly entered into by this defendant?"

Allowed.

Interrogatory No. 25-A: "Briefly and succinctly, what do you expect to prove as against this defendant by each?"

This is pretty broad, but on the same theory I think it is admissible, and will be allowed.

No. 25-B: "What written statement have you obtained from those whom you expect to use as witnesses?"

Allowed.

No. 1 under 25-B: "Briefly and succinctly, what
224 is the nature of each?"

Of course that could be answered by production of the statements, otherwise No. 1 will be required to be answered.

No. 25-C: "What oral statements have you obtained from those whom you expect to use as witnesses?"

Allowed. That will be answered as well as the subdivision No. 1 thereunder, with the alternative ruling I have heretofore made.

Mr. Britt: If your Honor pleases, 25-A comes under the same category as one you have previously denied, although you have allowed this one. It would be 10-A, on page 4, which is identical with 25-A here. I think you stated it was too broad.

Mr. Wallace: The purpose of that is to give us some clue as to what these witnesses will testify. There is no use of our going to New York or California if all they would testify would be that they signed this contract. We are not contesting whether they signed it.

The Court: Going back to 10-A, what difference is there in the situation with this question now, Mr. Wallace?

Mr. Wallace: If your Honor pleases, I thought at the time that we were entitled to have that answered, but it is not our position to be contentious on the ruling of the Court.

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The Court: Well, I don't want to require an impossibility, but I do want to allow you sufficient latitude to get the information necessary, and it looks like to me if you are afforded the names of the witnesses you could develop the information you want from that.

Mr. Wallace: They might say that John Doe will
225 be a witness, and they have a written statement from him, which your Honor has ordered produced, or they might say that they don't have a written statement, and then we would be no further along than we were when we started. A witness might state that he had a conversation between the President of our company and himself, and we would want to get the substance of that conversation so that we would at least know what they were going to try to prove the conversation was, in order to perhaps bring in other witnesses to disprove that statement.

The Court: Don't you think that these interrogatories, giving you the documents, and the written statements of other witnesses, will take care of it?

Mr. Wallace: I don't think so, but I am not going to argue with the Court about it.

The Court: Well, 25-A will be denied for the same reasons that I gave in connection with 10-A.

I believe I have ruled on 25-B and allowed it, by stating that it can be answered by the production of the statement; otherwise No. 1 will be required to be answered.

25-C is allowed as I stated before, that will be allowed with the alternative ruling I have heretofore made.

26: "What inference do you rely upon, and will you rely upon, to establish that this defendant entered into the alleged monopoly?"

That I think again calls for an interpretation of the evidence, rather than evidence itself, and will be denied.

No. 27: "What circumstantial evidence do you
226 rely upon and will you rely upon to establish that this defendant entered into the alleged monopoly?"

I think that is more or less asking for an interpretation of the evidence by the plaintiff, and will be denied.

No. 28: "What acts or declarations of the co-defendant of this defendant or alleged co-conspirators of this defendant, whether parties or not, do you rely upon to establish that this defendant entered into the alleged monopoly?"

That will be answered.

Interrogatory No. 29: "Do you contend that the alleged monopoly is evidenced by any acts of this defendant in

participating in the meetings of the Cotton Valley Operators Committee?"

What I have said before applies here. This will be allowed for the same reasons given to similar interrogatories.

INTERROGATORY No. 29-A: "If so, what are the dates of such meetings, what acts are relied upon, and what participation does this defendant take therein?"

This is allowed.

No. 30-A: "If so, what are the dates of such minutes or resolutions, and what part thereof do you contend evidence such alleged monopoly?"

This will be allowed.

No. 30: "Do you contend that the alleged monpoly is evidenced by any minutes or resolutions of the Cotton Valley Operators Committee?"

This is allowed.

227 Now, under the heading: "Interrogatories Relating to the Alleged Price Fixing, most of these matters—practically all of them—are repetitious in form of other interrogatories under these other headings, but they deal, of course, with different subject matters.

Taking up Interrogatory No. 30, the first one under this heading: "Do you contend that the alleged price fixing is evidenced by any written contract or contracts to which this defendant is a party?"—that should have been 31—and that will be allowed.

INTERROGATORY No. 31-A: Is also allowed.

No. 31-B will be denied. It calls for an interpretation.

No. 32 will be allowed.

No. 32-A is allowed.

No. 32-B calls for an interpretation, and is denied.

No. 33 will be allowed.

33-A, allowed.

33-B, calls for an opinion and is denied.

No. 34: "Do you contend that the alleged price fixing is evidenced by any letters sent to the defendant?"

This is allowed.

No. 34-A calls for dates, and is allowed.

No. 34-B, calls for an interpretation, and is denied.

No. 35 is allowed.

No. 35-A, calls for dates, and is allowed.

No. 35-B, is denied, because it calls for an interpretation.

No. 36, calls for any telegrams sent to the de-
228 fendant, and is allowed.

36-A is allowed.

36-B is denied, as calling for an interpretation.

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37, allowed.

37-A, allowed.

37-B, calls for interpretation, and is denied.

38 is allowed.

38-A, is allowed.

39, is allowed.

39-A, is allowed.

No. 40: "What are the names and addresses of all of the witnesses by whom you expect to prove the alleged price fixing entered into by this defendant?"

I believe that has been answered in one of these other questions under a different heading, but I will require you to answer it.

Mr. BRITT: I stated that we would give them all of the names of all of the witnesses, as well as the addresses.

The COURT: No. 41-A, I deny that.

No. 40-B, is allowed.

No. 1 under 4-B, is allowed.

No. 40-C, calls for oral statements, and is allowed.

No. 1 under 40-C is allowed.

41 is denied, as calling for an interpretation of the evidence.

No. 42 will be denied, because it asks for circumstantial evidence which in any circumstance would have to
229 flow from the evidence itself, and this would be argument.

No. 43 will be allowed.

44 calls for any acts of the defendant in participating in meetings of Cotton Valley Operators Committee, and is allowed.

44-A, calls for dates, and is allowed.

45 and 45-A have reference to minutes and resolutions of the defendants, and will be allowed.

As I say, 45-A is also allowed.

Now, under the heading: "Interrogatories relating to the alleged commen selling agent", these questions are substantially the same as the others. We begin with No. 46, which is allowed, as dealing with written contracts.

46-A calls for dates, and is allowed.

46-B, calls for an interpretation, and is denied.

47 calls for oral contracts, and is allowed.

47-A, is allowed.

47-B, calls for an interpretation, and is denied.

48, is allowed.

48-A, calls for dates, and is allowed.

48-B, is denied.
49, is allowed.
49-A, allowed.
49-B, denied.
50, is allowed.
50-A, allowed.
230 50-B, calls for an interpretation, and is denied.
51, is allowed.
51-A, is allowed.
51-B, asks for an interpretation, and is denied.
52, calls for information as to whether it is contended any conversations were had with defendants' officers, and so forth, and it is allowed.
52-A, allowed.
52-B, is denied.
53, is allowed.
53-A, is allowed.
54 and 54-A are allowed.
No. 55, is allowed.
55-A, is denied for the reason stated with reference to 10-A and 25-A.
No. 55-B is allowed.
No. 55-1, allowed.
55-C is allowed.
55-C-1, allowed.
56, will be denied.
57—this will be denied as calling for an interpretation of the evidence.
58, will be allowed.
59, will be allowed.
59-A, is allowed.
231 No. 60, allowed.
60-A, is allowed.

Now, under the heading: "Miscellaneous Interrogatories", the first we have is 61, and I see no reason why you should not give that.

Mr. BRITT: If your Honor pleases, that calls for an interpretation of the evidence, and a legal conclusion on my part, as to when, if it ever did, become illegal. The only time it became illegal was when it was a part of an illegal conspiracy.

Mr. WALLACE: You say that while we were producing distillate commercially in the plant it was a legal proposition, but when we started to processing the impurities, and changing them to some seven or eight other products, then it became illegal. Their plant was in operation from 1940

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down to date, and we want to know about what time, and at what place, you contend the operation became illegal. It would expedite this trial tremendously to have them fix the time and place, if your Honor pleases.

Mr. Britt: Mr. Britt the operation of the plant may have been entirely illegal. A conspiracy can be carried on by legal means if it has an illegal object in view. It is for the Court to interpret if it ever became illegal. It is not for me to state the date that it became illegal. It is a thing that you cannot put your finger on the moment or the date, but anything that was done in the conspiracy that tended to carry out the conspiracy would be a part of it.

A man might be standing in the courtroom, and then leave and walk across the street and go into the
232 store and buy a gun with a license to carry it, and then carry it down the street and hand it to another person for whom he bought it who has no license to have it, but if he bought it in the first place for the purpose of giving it to the man who had the license to carry it, it becomes just as illegal when he bought it as when he handed it to the person who had no permit to carry it.

Mr. Wallace: Well, if they will just say that the date is after September 13th, 1945, I think I can go home. Of course I cannot anticipate what the Court is going to rule, but it is our theory that if they say that it was back in 1940, then we have the defense of what we were doing up there under Regulation PS10B and 10C of the Public Service Commission.

On the other hand, if they say that it has been since that date, then the date is vital to this lawsuit, as the Court will find out on the trial of this case.

The Court: Well, let's do a little further analyzing of the matter, and see where we are.

Of course, ordinarily when you file a lawsuit you make allegations somewhat of a general nature, particularly under the present Rules of Procedure. You are not required under the present Rule to go into great detail. That matter has been thrashed out here on the exceptions and requests for more definite statement of facts, and particulars, and an amendment has been filed, and what they have said, as I said this morning in passing on it, that the illegal activity began after the extraction of the gasoline from the gas which was recycled into the earth, and from then on in the refining, processing and selling of the gasoline
233 there was a conspiracy.

Now then, of course it might be impossible to fix that particular date. I say that on the theory—I don't know whether they can fix it or not—they possibly might fix it, but, on the other hand, conspiracies are usually proven by circumstances, but what was done here, what was done there, and so on and so forth.

If it were possible to say that all of these defendants, after they had extracted enough of the gasoline from the gas and had recycled it, to produce sufficient quantities that would justify the use of it in refining, and they all reached an agreement and built a refinery on the spot to refine it, and to keep anybody else from getting it after any of the gas had been taken from the earth, then the conspiracy may have begun right there. Now, that would be easy to prove if you had someone who had signed a statement, either in a letter, or a contract, and it was signed between the parties entering into a formal agreement.

However, conspiracies are not proven in that way. They are proven by facts here, and acts here, and it is a rather hard thing to just put your finger on a definite moment, or definite date, and say positively that it started right here.

Therefore, I do not think that the Government can be tied down to a specific date. Proof of the allegations of the indictment that conspiracy existed might extend over a period of time from one date to another, for months, or even years. As I say, I do not believe the Government can be tied down, or be required to fix that any more specifically than they have set forth in their pleadings heretofore. So No. 61 will be denied, in view of the ruling heretofore made on it by the Court.

234

No. 62: "What specific process or procedure in such plant do you contend rendered its operations illegal?"

I just don't get that.

Mr. Wallace: May it please the Court, the purpose of that, as I understand it, is that the process has undergone a lot of changes out there, and the conspiracy in this case is absolutely tied up like Siamese twins with the operation of that plant. Now, there isn't any secrecy about the Government's contention; they say that all of the defendants got together, and they allege that contention, and they changed the processing of distillate in general by the committee of the operators illegally. Now, that plant has undergone a lot of changes, and these dates of these processes are going to have a considerable effect on this charge of conspiracy, taking their allegations into consideration,

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that they changed it from an open market, to one in restraint of Interstate Commerce, or open unrestrained trade, and I say that we have got to have this information on these dates so that we may properly plead, and know how to properly plead, because if they allege one operation at a certain time, we can perhaps prove that we were not even in that territory at that time, and we say that we should have all of this information, and that if we have it we can plead in such a manner that we can simplify this lawsuit ninety-five percent.

The COURT: Processing of the material that came out of the ground is mechanical, and perhaps chemical, taking place in the plant; what in the nature of the procedure do you refer to?

235 Mr. WALLACE: There have been a number of operations, a number of changes in the procedure, a number of other operations have been added, or taken from it. The cycling of the gas in the plant has been changed. Stabilization has been changed. Actually not all of the gas was stabilized, but then there has been various stabilizers added, and it is important for us to know where in this operation, what procedure they say is illegal. Counsel has admitted that certain features of the process may still be absolutely legal, and we want him to point out to us at what phase, what stage of the process, he claims that the processing becomes illegal.

The COURT: I know very little about the processing of this gas. I imagine it comes out of the ground as gas and is heavily ladened with distillate, or whatever else is being extracted for gasoline, or these other products, and that ordinarily this gas would go into a pipe line and go to the consumer to be consumed, or go through an extraction plant where the gas, or gasoline would be taken out, and the gas itself discharged into a pipe line to be transported for domestic or commercial consumption.

It is stated the agreement that was made contemplated some type of mechanical apparatus, mechanical operation, that would extract the volatile element from it and recycle the residue of the gas.

Now, that seems to me was necessarily a logical step in the course of the operation.

Now then, after that was done and the substitution, or institution of what the Government says from then on entered into a further assignment after the first operation had been completed, of refining the product thus secured, and transporting and selling that product was all in

236 the operation that was carried on.

Now then, I do not understand just how the mechanical operation in the plant has a great bearing upon the question of when the conspiracy began, unless there was some particular point where there were reservoirs or tanks, into which the residue, after extracting it from the gas that was recycled into the earth, was carried, and then into the refinery, or shipped by tank cars, or by pipe line, or some other way, or if there was available at that point some valve, or some way of taking it and separating it from the recycling process, and from there on the Government should claim that it was illegal.

Now, this is a technical operation, involving a chemical as well as a mechanical operation, as I understand it, and I am not sufficiently advised on all of them at this time to know just what you are trying to show by that.

Mr. WALLACE: Your Honor, this pleading starts off with this in mind: That there was nothing illegal about that plant until—in other words, the plant which takes the gas out of the ground at the well head and cycles it, that is separates the heavy liquid element from the dry gas itself, and then takes the dry gas and puts it back into the ground, in the same well, or maybe other wells—now, there was nothing wrong about that. As a matter of fact the State of Louisiana required that operation to be done. Certainly that is a simple process.

But the Government says that you cannot strip these liquid molecules out of their native state into distillate, and take that product and convert it into something
237 else, because it isn't stabilized. You have to have pressure, and the proper temperature, and that is the very purpose of this plant. It wouldn't be much involved in merely stabilizing it. There are other processes which have to be followed, otherwise it would evaporate at atmospheric temperature. There is a part of that distillate that has to be kept under pressure at all times, because it has to be treated, and if you put it in an open dish it will not be there very long, and it has to be kept in a container and under pressure in order to go through the process by which some parts of it can be treated. During that time it has to be at an even temperature, under certain pressure ranges, and inside of a container; otherwise it would escape to the four corners of the earth.

Now then, that plant started out with just stabilizing some of the distillate—I think it was twenty-five percent. or even less.

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Later on, and progressively through the years, that distillate was stabilized more and more, until ultimately parts of it became equivalent to gasoline, kerosene, solvent, and other products. So that liquid which was originally taken out of the gas, and the dry gas put back into the ground, was under tremendous pressure and other changes, such as temperature, sometimes under very high pressure, so that even the original character of the distillate was changed into other products, such as gasoline, kerosene and solvent.

That plant then has undergone a number of basic changes necessary for these pressure treatments. There have been changes in the storage facilities, and changes in the equipment of the plant, and so on.

238 I think it will be the Government's contention, and I think that they might point them out, that it goes up to a point in the stabilization of that distillate, and beyond that any contract that was generally entered into for the handling of that product thereafter of itself was a violation of the law.

They have denominated that as a conspiracy, and I think that if we can get them to isolate what they say about that conspiracy from the operation of that plant, I think for the first time in this lawsuit that we have got somewhere, and can accomplish something. In other words, if we can get them to point out at what particular point in this processing they say that it was illegal, and that the rest of the processing prior to that time was legal, then we have a working basis from which we can go forward and try this lawsuit, or have your Honor to throw it out.

That is the purpose of these questions. I do not speak for others of the defendant, but it is our position, in order to protect ourselves, that we are entitled to this information, and that with that information in hand we can draw proper pleadings, and furnish proper proof, which would show to your Honor or any other judge that there was absolutely nothing illegal, so far as my client is concerned, about any of it. That is all we are trying to do. I want to find out what the shooting is all about.

The COURT: Well, I can conceive that the very nature of the operation was admittedly, in the first stages, necessary for economic stability, in order to recover the values from this type of gas in the field, and that the combined operations of those in the field would be more economical for that purpose. I can see where the economy of the thing

would play a great part, by having all of the op-
239 erators process it through one plant, and that would perhaps save the building of numerous plants, and make it more economical to those operating in the field.

However, as I conceive it, that isn't exactly the complaint here. The complaint here seems to be after that process was carried out, there was a combination and conspiracy, as the Government alleges, among these operators to put the squeeze play on other operators in the refining of these other products, and the marketing and selling of them, eliminating competition entirely.

I do not know anything about petroleum engineering, nor of chemistry, or anything like that, and I am just going to have to see what the facts are, but it is conceivable, with as little as I know about it, that when that condition was produced it was a condition where it was necessary to have a continuous operation, and that that operation had to be carried on in the field, or at the place where it was produced in order to eliminate, or extract the liquid element from it. If that were shown, and it developed it was impossible to divide, or sell it at competition in the market, or offer it in open competition in the market, because of the involved process, and that these things could not be accomplished any other way, then, of course, we would have to look at this from the standpoint of practical men, and it might not be an illegal operation.

On the other hand if there was, as a matter of fact, from a technical standpoint, a stage when, as a matter of fact, this material could be made available for competitive purchases, by many users or refiners, and instead of permitting that to be done, it was thrown into a common pool, and competition was shut out in that manner, a different
240 result might flow legally from those activities.

I do not know whether in this procedure there was a stage reached where that could be done, but in the trial of this case you are going to have to define that, and you are going to have to show that at some stage of the case it became available to the competing public, and that, in substance, is what they are asking you to do today. You will have to prove that ultimately; why can't you give it to them now?

Mr. Britt: Well, if your Honor pleases, that is what I have been arguing right along. It is up to me to put on the testimony as to how this plant was operated, and then it becomes the duty of the Court or a jury to determine at what point the operation became illegal. It is our duty to

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bring that evidence in, and when it does become illegal in the process, or operaton of the plant, is a matter for the Court to determine.

The COURT: Yes, finally that is true, but this question calls for more or less a statement of facts. That is what I am talking about now. At what stage of the operation of this plant was it made available to the public, or was it ever made available to the public.

Mr. BRITT: That is a question for you to decide after we bring in evidence on these various stages showing just what they were doing. It is not for me to judge now at what point it became illegal, or at what point it was legal. I may lose this case if I don't prove it, but it is up to your Honor to decide the legality after I have produced the facts.

The COURT: Well, you will have to put some ex-
241 pert or experts, on the stand to prove the facts about that operation, and the availability, or non-availability, of this setup for the use of the general public, and if you are going to have to do that you are bound to know generally what you expect to prove; why can't you tell them that now?

Mr. BRITT: Well if your Honor pleases, I still contend that it is not for me to give my legal conclusion as to when something became legal, or became illegal. It is for me to present the facts, and for the Court to determine that point.

The COURT: Well, gentlemen, it is twelve forty-five. I hadn't noticed the lateness of the hour. So we will adjourn until 2:00 o'clock, and come back here and finish thrashing this out.

(Whereupon, at 12:45 o'clock p. m., a recess was taken in this hearing to 2:00 o'clock p. m., of the same day.)

AFTERNOON SESSION

The COURT: Gentlemen, we were at the stage of disposing of these interrogatories under the heading of "Miscellaneous Interrogatories", at the time we took the adjournment for the luncheon hour. I think what we were discussing when I took the recess was the question of whether the Government should answer these interrogatories to the point of disclosing the process or procedure during which the legal operations by the defendant ceased, and the illegal operations began. I think I was saying to counsel for the Government at that time that I believe he will have to prove that when it comes to the point of trying the case, and I think I had asked him, that being true, why

he could not answer that question now, and what was your response?

242 Mr. Britt: Your Honor had stated that I would have to prove that by expert witnesses; I submit that even though that might be true, it is possible that after the expert witnesses had finished testifying nobody could tell when it became illegal from the point where it had been legal, but that would be a matter for the Court to decide. That is my position on it.

The Court: You should be able to say, or have some person to say, just at what point in that process of operation the possibility of carrying on a monopoly began. That is what you are going to have to try to prove when you get to that point in the trial of the case.

Mr. Britt: That would come in the point of the operations where the products were not made available to the public, that is the operations were carried on in such a manner that former customers, former members of the public, were unable to do business by reason of the operation.

Now, that is only a part of it, however. There were other operations in the conspiracy that have to be taken into consideration.

The Court: It is a question of whether they had that invitation when they started. That would be decided from all of the evidence, but you will have to show just what was done, and what stage was reached at which they ceased to carry on what was declared to be necessary and proper by the state, and then began to carry on for their own profit.

Mr. Britt: Actually the operations may have been the same operations which were approved by the state,

243 and yet they may have been a part of the combination and conspiracy that might have continued throughout a period of time. Now, the plant may have been totally illegal, even though parts of it were approved by the state to be legal, such as recycling and putting back into the ground of sufficient gas to maintain the pressure during all periods that would accomplish the purpose ratified and okehed by the state, and yet other operations that were being carried on may have been totally illegal, and is a part of the conspiracy, and not in accordance with the agreement that was approved by the state, but in accordance with a separate outside agreement. So this may be, in accord with another case decided by the court recently, such that a conspiracy of that kind is in effect renewed during each day of its existence.

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The COURT: That may be true; at the same time there must have been a stage at which it became illegal.

Mr. BRITT: No, sir, because one day during the operation they may have taken that same gas out of the ground and recycled it, and they may have carried that off and sold it at a fixed price, and the next day they may have come along and done the same thing, recycling it in the ground, and it might have had the approval of both the State and Federal Government, and was done through the same physical process, or mechanical process, when one day it might have been legal, and the next day it might have been illegal. That is a matter of law that has to be determined from the facts brought out by the testimony, and there isn't anything that can be answered to that interrogatory as to fixing a definite date, or taking a definite part of the process and
244 saying this is legal, and that isn't. It was not the process that we complain of; it was what they did with that contract.

The COURT: Mr. O'Quin has indicated that he wants to say something. Have you something to say, Mr. O'Quin?

Mr. O'QUIN: Yes, sir. We are trying to get the facts in the case. That is all that we are trying to do, and all that we have been trying to do all along, trying to get the facts in this case. That is all we are asking for, the facts.

Now, he mentioned about the end products, and putting the gas back into the ground. We are asking for the facts about that. He says that we were extracting certain end products, and that it seemed to be all right until we changed our plant. We have always had end products as long as we have had the plant. If the plant was changed, we still had the same end products.

They allege that we have deprived other people of these products, and named certain individuals that could use the products. Now, we have to know these end products in order to prepare our case, and to know what end products they are talking about.

He mentioned mechanical and chemical processes, and said that he didn't know anything about that, but it would have to be proved by experts, and it would be left up to your Honor to decide. I make the statement, and I don't think that I will be disputed by the Government's witnesses as to the real facts, but in order to make it clearer, it has been true since the plant was started that the purpose of it was to carry on a mechanical separation of the hydro-

245 carbons, and there has been no change in that. If you take them back and put them under the same temperature and pressure that you started out with you will have the same thing that you started with. You don't change anything chemically whatever.

In that connection we are entitled to know—it is very important—we are entitled to know wherein, and at what point, he claims that we make any change chemically, and, if he calls it an illegal change, at what point that product becomes an illegal product, and we want to know all of the facts so that we can show whether or not these other parties could have used them, and whether or not they could have gone into the business of using them without loss.

Your Honor, we are merely asking for the facts, as I stated before. When we asked for them originally in a motion to make more definite they stated that these were evidentiary facts, and that we would have to resort to discovery. Now, when discovery is resorted to, they don't want to give us the facts. We certainly should have them, and we are entitled to them. We would like to see what he claims the facts to be. We cannot know until we know at what point in that plant they say the legal operations cease and illegal operations commence. When we know that then this lawsuit will be simplified; otherwise we cannot reasonably be expected to meet a blind issue.

The COURT: Why can't you take your experts that you are going to have to use and sit down and have him to describe this process, and how it was processed, and when it becomes a monopoly?

Mr. BRITT: I did not hear that. I am sorry.

The COURT: I say, why can't you get your expert
246 witnesses and sit down and have them to describe the process, showing how it was processed, and when you are they claim it became a monopoly, and what is produced, the different kinds of liquids that are produced, and when that process became a monopoly.

Then why can't you show the point at which it becomes available to the public, and show that they refuse to let the public participate in it, which would show that it was a monopoly?

Mr. BRITT: If that is what he means I guess I might do that.

The COURT: Well, that is what he is asking you to do, if I heard him correctly.

Mr. BRITT: I don't know that I can do it, but I will see.

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The COURT: Of course, according to your theory of the case, they might do it today, and not do it tomorrow, because they might put it all back in the ground, but if you decide the process by which they do that, presumably when they did begin to carry out that operation that would be the point you are referring to, and they should be satisfied with that answer.

Mr. BRITT: That would have to do with some of the other questions also.

The COURT: Yes, that runs all down through it. I think it perhaps would aid counsel, in the light of what we have said in this discussion, would do just what I have stated here, showing what he expects the Government to
247 prove, and furnish all of the facts he has in his possession in his response to this 61. It think that can be done in that manner. I think that counsel for the defendant might get together with counsel for the plaintiff and, in the light of what has been said here, orally state to him more definitely what he wants, and, in the lights of this discussion, it seems to me that they could get together on what the Government should furnish.

Mr. WALLACE: Would the Court care for me to do that now?

The COURT: No, let's get through with all of the rest of these questions. However, if counsel for defendant would elaborate more on what he expects the Government to furnish in the way of facts in response to this 61 I think that the Government could more clearly answer it.

Mr. BRITT: This is to be substituted for these interrogatories?

The COURT: Yes. Then I can rule on how far I will go in requiring you to do what the interrogatory indicates.

Mr. WALLACE: Under No. 61, the Government has admitted that the operation of the plant of the CVOC at Cotton Valley was—

Mr. BRITT: If your Honor pleases, I object to counsel stating what the Government has admitted.

The COURT: Let him get through, ad then we will discuss it and put it in final shape.

Mr. WALLACE: Mr. Reporter, will you read me what I have said?

(Whereupon the Reporter read the last statement
248 of Mr. Wallace as far as it had gone.)

Mr. WALLACE: (Continuing) was legal initially. Now, on what date after the initial operations of the plant of

the CVOC at Cotton Valley, Louisiana, do you contend that its operations became illegal?

The COURT: That is all you said in your original question.

Mr. O'QUIN: Suppose we make it: "If the plant was ever changed so that we conducted illegal operations".

Mr. WALLACE: I accept that amendment.

The COURT: What objections do you have to that?

Mr. BRITT: I think that will be all right.

The COURT: All right, you may answer that.

Now, taking up No. 62: "What specific process or procedure in such plant do you contend rendered its operations illegal?"

Can't you answer that?

Mr. BRITT: I thought this was all referred to in 61, and that we were down through 63.

The COURT: What about that, Mr. Wallace?

Mr. BRITT: (Continuing) Because we have the same testimony, or would have the same testimony in 62 that we just tried to agree on in 61, about when it became illegal. They are trying to question me about when this plant could have been used in an illegal conspiracy, and at what special process, or step in the process or procedure in that plant it could have been used in an illegal conspiracy, and now they are asking me about the physical equipment
249 which was involved, and which could be used in an illegal operation.

The COURT: I think that Mr. Britt might answer 62 in the light of what he is going to answer to 61.

Now there is a great deal in here that you are bound to know, Mr. Wallace, about the officers who were in charge of the plant itself, and what the physical equipment was. You know that better than Mr. Britt could know it.

Mr. WALLACE: Yes, sir. We do not ask them to show us any detailed graph of just each piece of equipment, and what its name was. We don't expect them to answer such a question as that. All we want to know is what physical equipment was involved in the alleged illegal operation.

The COURT: Well, that is what you are asking for in 63.

Mr. WALLACE: Yes, sir, because, as has been stated before, we have added to, or changed, or taken from that equipment on four or five or six different occasions, and they can answer these questions as to when it was, and with what equipment we violated the law. It isn't a question of us knowing what equipment we have had at different times, but it is

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a question of them telling us what equipment we were using to violate this law.

Mr. BRITT: We would have to ask them that.

The COURT: Well, I think I will allow 63 also.

Now, 64: "Exactly what change in process or procedure do you contend should be enjoined by the Court?"

250 Of course, when it comes to requesting an injunction, which is a harsh matter, you have to prove your case in detail, and you are going to have to establish that, so why shouldn't you give it now?

Mr. BRITT: My objection now to that is that this is a question that should not be answered until the date of trial, and until after the Court has had a chance to know whether we are entitled to any relief.

Mr. WALLACE: Now, if your Honor pleases, that is just the very trouble about the Government's attitude in this case. This is an unusual lawsuit to say the least, and we want to get ready to try the lawsuit. We do want to have any loose ends hanging around. We want to be able to present our testimony. Certainly, regardless of counsel's attitude in the matter of wanting to withhold the facts, we are entitled to them in order to prepare our defense. We cannot get expert testimony and have it ready to bring in here to refute the allegations, or rather contentions of the Government, unless we know specifically what the Government is going to try to prove. I do not think that we are asked to come in here on the day of trial totally blind as to what the Government is going to try to do to us. I think that this Court is a court of equity, and we are entitled to courtesy in this lawsuit just as we have given it to them. How in the world can we be prepared to answer on the day of trial any testimony they may present by some expert witness they bring in here from New York or Chicago or some other place with whom we have never talked, who may take the stand and attempt to prove that our process was illegal at a certain juncture, when we have no infor-

251 mation as to what he is going testify. That is exactly what these interrogatories are about. We are attempting to find out what the shooting is about.

The COURT: I think you can answer that interrogatory, Mr. Britt, so No. 64 will be answered.

The same ruling as to 65.

I see no reason why you should not answer 66, which asks:

"Do you contend that the defendant Magnolia Petroleum

Company is now agreeing on prices of its products produced through the CVOC plant?"

That is true also of 66A: "If so, through whom and by what is this agreement being effected?"

Now, No. 67: "Do you contend that since the filing of this suit defendant Magnolia Petroleum Company has agreed with any other defendant or with any alleged co-conspirator to fix prices of its products produced through the CVOC plant?"

I think you can answer that.

Mr. BRITT: Isn't that basically a legal conclusion that he is asking for?

The COURT: A reading of the pleadings in the case, particularly with reference to the Magnolia, seems to justify that, Mr. Britt. You have been charged as a co-conspirator, and I think this particular question is applicable to the Magnolia alone. Let 67 be answered.

68: "Do you contend that the defendant Magnolia Petroleum Company now has designated a common selling
252 agent to dispose of its products produced through the CVOC plant?"

Why can't you answer that? Let it be answered.

68A: "If so, who is this alleged common selling agent and by whom and how was said common selling agent designated?"

Let that be answered.

69: "Do you contend that since the filing of this suit defendant Magnolia Petroleum Company has agreed with any other defendant or with any alleged co-conspirator to designate any common selling agent to dispose of its products produced the CVOC plant?"

I believe that is an issue of fact that will have to be answered on the trial, so there is no reason why you shouldn't answer it now.

All right.

Mr. BRITT: Now, may we conclude by asking the Court one question, which bothered us during the noon hour. Is it understood that with respect to the interrogatories relating to documents and their contents, if we furnish the Magnolia Company with the documents which we have examined, that that will be an answer to those interrogatories?

The COURT: To the extent that I have given the alternative of producing the documents or answering the questions, as previously stated, yes. I have indicated in each instance where you could either give the information or furnish the document.

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Mr. BRITT: I wanted to know whether that applies to all of those questions or not. I did not understand whether it applied to all of them.

253 The COURT: Where they ask for the content I gave you the alternative of producing the document or giving them the information.

(At this point a discussion ensued as to how long the Government would be allowed to answer the interrogatories, after which the Court ruled Government counsel would be granted sixty days within which to comply with the Order of the Court.)

The COURT: Mr. O'Quin, did you have something?

Mr. O'QUIN: Yes, if your Honor pleases, and it has to do with whether or not the Government shall produce the FBI reports. Originally the Government asked for time in which to submit a brief on whether we could get the FBI reports, and the question was limited then to whether or not the FBI report could be considered privileged in themselves. Now, they brought the suit themselves, and I submit that the FBI reports take the same place as the reports of any other investigator, or investigators. You touched on this question to some extent this morning, but I don't think you settled it entirely.

Mr. BRITT: Of course, if your Honor pleases, the question of privilege we still insist upon, and we take the position that these reports are entirely different from those of other investigators. That question of privilege was whether or not there was a similarity in privilege between attorney and client, but it is our contention that this privilege is statutory, provided it was done within the discretion of the Attorney General, and the copy of the report in his pos-

254 session is privileged. We make that point in addition to the point which was urged in our brief, which was mainly based on the Hickman vs. Taylor case, which case we discussed to some extent this morning.

If it was the direct work of the lawyer, it seems to me, and I don't think that your Honor would rule against it, that if the lawyer went out and got oral statements an oral statement from someone he was going to use as a witness, he would not be compelled to disclose that statement to the other side. That would be within the Hickman vs. Taylor case, as I see it. Now, the question before us is if an FBI Agent went out and did the same thing, could we claim the same privilege? We do, as far as this matter is concerned, say that he would assume the same position as the lawyer.

The COURT: Mr. Britt, I think Congress has made the law so that when the Government comes into court in a civil action, especially as a plaintiff, it comes in as an ordinary litigant like anybody else, and I think the rules applying to ordinary litigants apply to the Government as well as they do anybody else in a civil action.

Now, I have tried to differentiate—I do not know whether I have succeeded in doing so or not—between a situation where a criminal investigation was in process, and the Government was collecting what information it could to aid it in a criminal prosecution—I don't think that it should be required to disclose that information gathered in and for the purpose of a criminal prosecution.

But if the Government can send out an FBI Agent and obtain written statements from persons who will be
255 witnesses in a civil suit and not be compelled to produce them, I can see no reason why a railroad company, or insurance company, cannot send out a Claim Agent and take written statements and take the same position. The relationship between attorney and client is the same in those two instances, or the same in that instance of the railroad company or the insurance company, as it is between the Attorney General, or the Attorney for the Government in these matters of a civil nature, and I do not think the Government stands in any different position from any other ordinary civil litigant in a civil case. Insofar as the privileged nature of the document may be concerned I do not think that the Attorney General stands in any different category from a private corporation when it comes to the production of documents or written statements he may have in his possession of what witnesses may say.

Mr. BRITT: If your Honor pleases, I think that the courts have distinguished between corporations, like railroad companies or insurance companies, which maintain regular staffs of investigating agents whose business it is to make investigations of cases that might be brought against them, in producing written signed statements, and statements which may have been made by the agents themselves, which do not purport to be statements written or signed by the prospective witness.

If your Honor pleases, that is one of the distinctions that we are making here; that the statements of these FBI Agents do not purport to be statements made by the prospective witnesses themselves, but they are nothing more or less than a statement made by the FBI Agent him-

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256 self, giving his construction and understanding of what the prospective witness may have stated to him. There is quite a distinction between that kind of a statement, and a written statement made by the witness himself.

The COURT: Well, that is a very thin line of demarcation.

Mr. BRITT: Has your Honor studied the decision of the Supreme Court in the Hickman case?

Order Sustaining Motion for Production of Documents

The COURT: Mr. Britt, I have read it, but I repeat, if you can tell me what the Hickman case has held it will certainly enlighten me very much, because I have been unable to tell, or distinguish, from that ruling what it does mean.

I think I might dispose of it this way: That you are to produce all letters, statements or documents that bear on this case which do not include any privileged matter as between the Government and the Attorney General and anyone who might be a prospect for a charge in a criminal prosecution, because then you get to the point where you have a criminal case, where I do not think you are required to divulge the product of your investigating agent.

Mr. BRITT: To what extent does that order go? You say "letters and documents"—

The Court: (Interrupting) That means whatever they have called for in the way of written documents.

Mr. O'QUIN: In the motion to produce.

The COURT: Yes.

I think I will allow the motion to stand, and within
257 sixty days determine the matter of his right to plead that. Counsel for the Government takes the position that some of these matters are privileged, and if Counsel for the Government continues to take the position that there is anything privileged in there which might interfere with the proper administration of justice he can produce it and make that contention, and the Court will determine whether it will be received and used as evidence in the case or not. I do not know any other way of distinguishing between what should be furnished in the trial of a civil lawsuit, such as this, where the Attorney General claims the question of privilege. I shall just have to look at it and determine it then.

Mr. O'QUIN: Then, as I understand it, will the same privilege be given to us?

The COURT: Certainly. At that time I will determine the matter and rule on whether or not any of such documents will be received in evidence on the trial.

Mr. O'QUIN: What is the order with reference to the motion to produce against the Government?

The COURT: The order is that it will be produced, and if privilege is claimed as to any particular document, or evidence that is produced in written form, then it may be separated from the matter as to which privilege is not claimed, and later filed for inspection of opposing counsel, and the question of the use of that which is claimed as privileged will be heard and disposed of by the Court before that document may be used.

I am giving you sixty days to do all of this.

258 Mr. O'QUIN: You are going to claim privilege on everything?

Mr. BRITT: No, sir, but we do claim privilege on all FBI reports. The FBI reports will be submitted to the Judge.

The COURT: Then that will be done.

Mr. BRITT: I will have to see what the Attorney General says about this, as your Honor can appreciate.

The COURT: Well, you know I am going to have to pass on it.

Mr. BRITT: I understand.

The COURT: Is that all at this time, gentlemen?

Mr. BRITT: I believe so, your Honor.

(Whereupon at 3:00 o'clock p. m., March 11, 1949, the hearing on these matters was closed.)

Reporter's Certificate to foregoing transcript omitted in printing.

259 In United States District Court

(Title Omitted)

Answer of North American Oil Consolidated et al.—Filed April 7, 1949.

To the complaint herein, North American Oil Consolidated, Root Petroleum Company, Jabco, Inc., A. J. Hodges, M. H. Marr, W. G. Ray, Daniel W. Stewart, E. L. Stewart, Frank B. Treat and W. C. Woolf, defendants in the above entitled and numbered action, in answer to plaintiff's complaint, as amended by Plaintiff's more Definite Statement and by Plaintiff's Second More Definite Statement, say:

• • •

(File Endorsement Omitted)

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260 In United States District Court

(Title Omitted)

Answer of Defendant G. H. Vaughn—Filed April 12, 1949

Now comes G. H. VAUGHN, one of the defendants in the above styled and numbered action, and in answer to the complaint, as amended by Plaintiff's More Definite Statements, says:

• • •

(File Endorsement Omitted)

261 In United States District Court

(Title Omitted)

Answer of Bodcaw Cotton Valley Co., Inc., et al.—Filed April 13, 1949.

Now come Bodcaw Cotton Valley Co., Inc. and Grant Oil Company, Inc., defendants in the above entitled and numbered cause, and answer the complaint herein as follows:

• • •

(File Endorsement Omitted)

262 In United States District Court

(Title Omitted)

Answer of Sidney G. Myers, et al.—Filed May 3, 1949

Now come Sidney G. Myers, Mrs. Nellie G. Myers, and Welori Lumber Corporation, defendants in the above entitled and numbered cause, in answer to Plaintiff's complaint, as amended by Plaintiff's more Definite Statement, and by Plaintiff's Second More Definite Statement, say:

• • •

(File Endorsement Omitted)

263 In United States District Court

(Title Omitted)

Motion to Vacate Order of March 11, 1949, Directing the Plaintiff to Produce Reports Made by Agents of the Federal Bureau of Investigation—Filed May 10, 1949

The plaintiff, the United States of America, by its attorneys acting under the direction of the Attorney General respectfully moves this Court to vacate its order of March 11, 1949, which directed the plaintiff to produce for the

Court's inspection certain reports made to the Attorney General by agents of the Federal Bureau of Investigation in connection with their investigation of this cause, and certain correspondence between the Attorney General and third persons, for the reasons set forth in the attached affidavit.

As an alternative the plaintiff moves this Court, as also set forth in the affidavit of the Attorney General, for a modification of the order of March 11, 1949 to permit the plaintiff to extract the factual information contained in the reports in question and present such extraction to the Court for its determination as to whether or not such information is properly producible to the defendant for inspection and copying .

DANIEL B. BRITT
Daniel B. Britt
Special Assistant to the Attorney General

WILLARD R. MEMLER
Willard R. Memler
Special Attorney

MALCOLM E. LAFARGUE
Malcolm E. Lafargue
United States Attorney

264 In United States District Court

(Title Omitted)

Affidavit of Attorney General—Filed May 10, 1949

District of Columbia: ss

TOM C. CLARK, being duly sworn, deposes and says:

1. That he is the Attorney General of the United States, and has his office and place of residence in Washington, D. C.;

2. That he has been informed by his assistants in the Antitrust Division of the Department of Justice that this Court entered an order in the above entitled action on March 11, 1949, requiring the production for examination and inspection by the Court of certain reports made by agents of the Federal Bureau of Investigation to the Attorney General relating to the subject matter of the above entitled action, in the course of their investigation of this case;

3. That the inspection by the Court of the said reports is for the purpose of affording the Court an opportunity to de-

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termine whether a claim of privilege by the Attorney General is well taken or whether, in the opinion of the Court, the reports should be made available to the defendants for inspection and copying;

4. That for the reasons hereinafter set forth deponent has instructed his assistants in the Antitrust Division to move the Court to vacate the said order and deny the Motion to Produce;

5. That your deponent, as Attorney General of the United States, is in direct charge and supervision of the
265 conduct of the agents of the Federal Bureau of Investigation and particularly of their duties in connection with the investigation of crimes against the United States including violations of the antitrust laws; that deponent has been informed by his assistants in the Antitrust Division of the nature of the contents of the agents' reports of their investigation of this case;

6. That as Chief Executive of the Department of Justice, your deponent respectfully suggests to the Court that it is exclusively within the exercise of the judgment of the Attorney General to determine whether or not the reports and correspondence sought to be examined are privileged; that this prerogative derives from the Constitution of the United States and is in no way affected or changed by the Rules of Civil Procedure Relating to Discovery, particularly Rule 34; that under the authority of R. S. 161 (5 U. S. C. A. 22) (a copy of which is attached hereto and made a part hereof as Exhibit A) the heads of the Executive Departments of the Government are authorized to determine which documents of their departments are to be considered confidential and not subject to disclosure;

7. That pursuant to authority vested in the Executive Deparments of the Government by R. S. 161 (U. S. C. A. 22) the then Attorney General on May 2, 1939 promulgated Department of Justice Order No.3229 (a copy of which is attached hereto and made a part hereof as Exhibit B), which order is still in effect and specifically provides that all official files, documents, records, and information secured by or in the custody of the Federal Bureau of Investigation and other offices of the Department of Justice are to be regarded as confidential and can not be disclosed except upon the direction of the Attorney General;

8. That the efficient administration of the laws entrusted to his enforcement, as well as the public interest require that the Attorney General keep as confidential in-

266 vestigatory reports made to him by agents of the Federal Bureau of Investigation relating to violations of Federal Statutes;

9. That the reports of agents of the Federal Bureau of Investigation, made to deponent, which were ordered produced before your Honor by the Order of March 11, 1949, are the type of reports which the Attorney General has designated as confidential by Department of Justice Order No. 3229, promulgated on May 2, 1939, under authority of R. S. 161 (5 U. S. C. A. 22);

10. That while your deponent has directed his assistants to inform the Court that he has determined and hereby asserts that the reports in question are privileged, he has also instructed his said assistants to inform the Court that all of the factual information contained in the reports may be extracted from the reports and presented to the Court for its determination as to whether or not such information is properly producible to the defendant for inspection and copying.

s) TOM C. CLARK
Tom C. Clark
Attorney General

Subscribed and sworn to before me, a Notary Public in and for the District of Columbia, this 5th day of May, 1949.

E. J. MATCHETT

(File Endorsement Omitted)

267 *Exhibit "A" to Affidavit*

R. S. 161 (5 U. S. C. A. 22)

Departmental Regulations. The head of each Department is authorized to prescribe regulations, not inconsistent with law for the government of his department, the conduct of its officers and clerks, the distribution and performance of its business, and the custody, use, and preservation of the records, papers, and properties appertaining to it.

268 *Exhibit "B" to Affidavit*

Office of the Attorney General
Washington, D. C.

May 2, 1939

Order No. 3229

Pursuant to authority vested in me by R. S. 161 (U. S. Code, Title 5 Section 22), it is hereby ordered:

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All official files, documents, records and information in the offices of the Department of Justice, including the several offices of United States Attorneys, Federal Bureau of Investigation, United States Marshals, and Federal penal and correctional institutions, or in the custody or control of any officer or employee of the Department of Justice, are to be regarded as confidential. No officer or employee may permit the disclosure or use of the same for any purpose other than for the performance of his official duties, except in the discretion of the Attorney General, the Assistant to the Attorney General, or an Assistant Attorney General acting for him.

Whenever a subpoena *duces tecum* is served to produce any of such files, documents, records or information, the officer or employee on whom such subpoena is served, unless otherwise expressly directed by the Attorney General, will appear in court in answer thereto and respectfully decline to produce the records specified therein, on the ground that the disclosure of such records is prohibited by this regulation.

FRANK MURPHY
Attorney General

269 In United States District Court

(Title Omitted)

Answers of Plaintiff to Interrogatories Propounded by Defendant Magnolia Petroleum Company— Filed May 13, 1949

INTERROGATORIES NOS. 1 AND 1-A

Plaintiff contends that the alleged combination and conspiracy is evidenced in part by all contracts between the Cotton Valley Operators and Warren Petroleum Corporation for the disposal or sale of products of liquid and gaseous hydrocarbons produced or manufactured at the Cotton Valley Recycling and Pressure Maintenance Plant during the period May 1, 1941 to date.

Plaintiff contends that the alleged combination and conspiracy is evidenced in part by all contracts between the Cotton Valley Operators and Triangle Refineries, Inc., for the disposal or sale of products of liquid and gaseous hydrocarbons produced or manufactured at the Cotton Valley Recycling and Pressure Maintenance Plant during the period May 1, 1941 to date.

Plaintiff contends that the combination and conspiracy is evidenced in part by all contracts and agreements, whether in the form of open division orders or otherwise between the Cotton Valley Operators and the Standard Oil Company of Louisiana and successors, Magnolia and Petroleum Company, Placid Oil Company, Premier Refining Company and others for the disposal of stabilized distillate and other hydrocarbon products, manufactured or produced at the Cotton Valley Recycling and Pressure Maintenance Plant for the period May 1, 1941 to date.

Plaintiff contends that the agreement by and between the Cotton Valley Operators known as the Cotton Valley Unitization and Pressure Maintenance Agreement, dated on or about April 19, 1940, evidences in part the alleged

271 Plaintiff contends that the agreements and con- combination and conspiracy.

tracts by and between the Cotton Valley Operators and others for the construction of facilities for the production of Toluene or Toluene-naptha and the sale or disposal of the production of said facilities beginning on or about September 1942 evidences in part the alleged combination and conspiracy.

Pursuant to the order of the court of March 11, 1949, requiring answers to defendant Magnolia Petroleum Company's interrogatories, the plaintiff encloses herewith as part of its answers to these interrogatories all above-mentioned contracts now in the possession of the plaintiff. Plaintiff does not have at this time in its possession certain of these contracts, but asserts that as soon as they or information concerning them, become available to the plaintiff such contracts and agreements or information will be forwarded to the defendant, Magnolia Petroleum Company.

INTERROGATORIES Nos. 2 AND 2-A

Plaintiff contends the alleged combination and conspiracy is evidenced in part by all oral agreements, contracts, or understandings between the Cotton Valley Operators, whether by majority vote or otherwise, decided and agreed upon at the various meetings of the Cotton Valley Operators Committee and its Subcommittees, for the disposal or sale of the products of liquid and gaseous hydrocarbons produced or manufactured by the Cotton Valley Recycling and Pressure Maintenance Plant, and for changes in the operations of the plant which resulted in curtailing or eliminating the production of certain products or creating processes not necessary to conservation. These agreements, contracts or understandings are referred to and re-

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flected in the copies of the minutes of said committees, and in telegrams and correspondence which are enclosed herewith as permitted by the order of the court dated March 11, 1949, requiring answers to the interrogatories of defendant Magnolia Petroleum Company.

272 INTERROGATORIES NOS. 3, 3-A, 4 AND 4-A

Plaintiff contends that the alleged combination and conspiracy is evidenced in part by certain letters sent and received by the defendant, copies of which are enclosed herewith as permitted by the order of the court dated March 11, 1949, requiring answers to the interrogatories of defendant Magnolia Petroleum Company.

INTERROGATORIES NOS. 5, 5-A, 6 AND 6-A

Plaintiff contends that the alleged combination and conspiracy is evidenced in part by certain telegrams sent and received by the defendant, copies of which are enclosed herewith as permitted by the order of the court dated March 11, 1949, requiring answers to the interrogatories of defendant Magnolia Petroleum Company.

INTERROGATORIES NOS. 7 AND 7-A

Plaintiff contends the alleged combination and conspiracy is evidenced in part by those conversations of the defendant's officials, agents, servants, attorneys, or employees which pertain to the agreements, contracts or understandings referred to in plaintiff's answer to interrogatories Nos. 1, 1-A, 2, and 2-A above. The times, places, substances, and names of persons participating are shown in the copies of the minutes of the Cotton Valley Operators Committee and Subcommittees and in the correspondence, telegrams, contracts, and agreements attached hereto.

INTERROGATORIES NOS. 8 AND 8-A

Plaintiff contends that the alleged combination and conspiracy was entered into by those officials, agents, servants, attorneys, and employees of the defendant Magnolia Company whose names and addresses appear in the documents enclosed herewith.

273 INTERROGATORIES NOS. 9 AND 9-A

Plaintiff contends that the alleged combination and conspiracy was in part the result of those acts of the officials, agents, servants, attorneys, and employees of the defendant Magnolia Company in discussing, agreeing, contracting, voting upon, or entering into the agreements, contracts, and understandings referred to in answer to interrogatories Nos. 1, 1-A, 2, and 2-A above.

INTERROGATORY No. 10

The names and addresses of all witnesses now known to the plaintiff by whom the plaintiff expects to prove in part the alleged combination and conspiracy are:

T. C. Wilson, Premier Oil Company, Longview, Texas;
Sylvester Dayson, Premier Oil Company, Longview, Texas.
J. R. Parten, Woodley Petroleum Company, Houston, Texas;
M. E. Sandlin, Woodley Petroleum Company, Houston, Texas;
R. P. Hargis, Premier Oil Company, Longview, Texas;
John Melton, Premier Oil Company, Longview, Texas;
J. Howard Marshall, Louisville, Kentucky;
H. D. Haney, Magnolia Petroleum Company, Dallas, Texas;
J. P. D'Artois, Ohio Oil Company, Shreveport, Louisiana;
John R. Butler—address unknown;
C. H. Witman, Esso Standard Oil Company, Shreveport, Louisiana;
Cecil Morgan, Esso Standard Oil Company, Baton Rouge, Louisiana;
Jack Coast, Coast Oil Company, Shreveport, Louisiana;
M. W. Boyer, Esso Standard Oil Company, Shreveport, Louisiana;
John T. Paul, Esso Standard Oil Company, Shreveport, Louisiana;
Powell A. Casey, Esso Standard Oil Company, Shreveport, Louisiana;
Roy Benoit—address unknown;
D. M. Healy, Louisiana State Department of Conservation, Baton Rouge, Louisiana;
274 H. L. Hunt, Hunt Oil Company, Shreveport, Louisiana;
Paul M. Raigordsky—address unknown;
T. W. McGuire, Shreveport, Louisiana;
L. H. Oliver, Jr., Shreveport, Louisiana;
Paul Goodwin, Cotton Valley, Louisiana;
Kurt Schroeter, Triangle Refineries, Houston, Texas;
N. Y. Jones, Cotton Valley, Louisiana;
Forrest W. Lowry, American Mineral Spirits Company, Chicago, Illinois;
Jack Manley, American Mineral Spirits Company, Chicago, Illinois;

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H. Pearson, American Mineral Spirits Company, Chicago, Illinois;
H. H. Fullilove—address unknown;
M. J. Rathbone—address unknown;
Sam Hulse, Warren Petroleum Corporation, Tulsa, Oklahoma;
H. E. Felt, Warren Petroleum Corporation, Tulsa, Oklahoma;
J. B. Sanders, Triangle Refineries, Houston, Texas.

The above addresses are those last known to the plaintiff. In the event plaintiff determines that it will call as witnesses persons other than those named above, such names will be sent to the defendant Magnolia Petroleum Company.

INTERROGATORY No. 10-B

Plaintiff states that it has not obtained any written statements from any persons whom it expects to use as witnesses.

INTERROGATORY No. 10-C

The following oral statements were made by persons whom the plaintiff expects to use as witnesses:

(1) Mr. N. Y. Jones at Premier Plant, Cotton Valley, made the following statement:

In the Cotton Valley field crude oil, gas and distillate are produced at approximately 10,000 barrels daily
275 from about 120 wells by 17 to 18 companies (principal producers—Ohio and Hunt Companies). Premier entered the field in 1937 with an oil refinery valued at $2,000,000,000 and purchased all raw materials from producers in the field on an open market basis. Sometime during 1939 or 1940 the CVOC was formed and since then all operators have sold their crude oil through CVOC. Prior to 1941 Premier could obtain its raw products from the producers and CVOC without difficulty but since the Declaration of War there has been trouble. The Federal Government constructed a high octane plant adjacent to the Premier property and since that time there has been trouble between CVOC and Premier.

Mr. Jones' explanation of the CVOC:

All the producers in the field in order to extract oil and gas at a minimum organized the CVOC. Each company chose a representative who met with other producers' representatives to formulate the policies and prices for the sale of crude oil, gas and distillate. This

was known as "The Large Committee." This committee being unable to carry out its plans decided to employ a manager and staff to do so.

This staff, all at Cotton Vailey, are as follows:

Mr. J. R. Butler, General Manager and Chairman,

Mr. Max Lents, Assistant to Plant Superintendent,

Mr. H. W. Hutchinson, Superintendent of Operations, and

Mr. Mickey McGuire, Field Superintendent.

The CVOC was a sales and accounting office. All operators turn over their oil to CVOC, who then sells to various refiners on the open market. Butler then sends the producers statements as to volume and sale price.

(2) Mr. Jubal R. Parten at Woodley Petroleum Company office, Huston, Texas, made the following statement on January 25 and January 29, 1946:

He is President of Woodley and Chairman of the Board of Premier. He was a dollar-a-year man from 1941-43 as Director of Transportation for PAW.

Cotton Valley oil field was developed a number of years prior to 1937. After five wells were completed, there was a very limited market for the distillate produced, Standard Oil of Louisiana being the only outlet for the field. A greater market being desired, Parten asked Sylvester Dayson of Premier to make a study and analysis of the distillate. After doing so, Dayson designed a refinery to make industrial napthas and gasoline. Premier constructed a refinery and purchased distillate from the producers in the field. Due to depth of the wells, production costs increased which the operators sought to decrease.

276 After a study in 1939 the operators agreed to form a committee and construct a recycling plant to produce stablized distillate. This was to conserve gas and energy. Stablized distillate was produced and gas was pumped back into the ground to furnish pressure. The plan of operation and the formation of the committee was discussed with the Conservation Committee of Louisiana and it being understood that the plan was a conservation measure, it was approved by the Commission. There was no discussion about the production of by-products of gas and distillate.

In about April 1940 the plan took the form of a written agreement. Standard Oil fearing possible violation of the antitrust laws sold its holdings in Cotton Valley.

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Standard Oil of Louisiana and Premier were both buying distillate at a posted price. Premier raised its price to obtain more distillate. The new price then became the posted price. The operations of the field were turned over to the committee and J. R. Butler, a former employee of Ohio Oil Company, was made plant manager.

Alterations in the plant permitted production of Butanes and Pentanes. A limited market for these products caused the operators to call a meeting. A discussion was had relative to finding a better market—the matter was taken up with Premier and negotiations were begun with M. D. Gilchrist of Universal Oil of Chicago for the construction of a 100 octane plant. The committee was kept informed of the progress. Premier filed an application with the PAW for the construction of the 100 octane plant.

After Pearl Harbor Butler and Dalton of Hunt Oil Company went to Washington and applied for permission for the CVOC to construct the octane plant instead of Premier. The application was not accepted and Premier was instructed to go ahead. Premier had to buy its butane from CVOC which raised the price but Premier had PAW fix the price under a war contract. Parten does not know of any discussion at CVOC meeting referring to this action by Butler and Fleming. Parten said concerning contact of Butler with Universal that Gilchrist of Universal would have nothing to do with Butler's suggestion since they wanted no part of a breach of contract between CVOC and Premier.

During 1943 CVOC spent over $500,000 to remodel plant for production of toluene. Materials for remodeling were made available by the government. Premier objected to the building of this plant and PAW required Ohio and Hunt to guarantee sufficient distillate to Premier for duration of the war and nine months thereafter. Parten feels that this circumstance indicates Butler's desire to put Premier out of business. He heard rumors to that effect.

Due to the fact that there is no market for 100 octane gas, the plant is in a stand-by condition at the present time. At the present time CVOC is manufacturing and selling gasoline, kerosene, diesel fuel and residuum fuel which are made from distillate. Sale of distillate
277 to Premier has been cut down and none is being fur-

nished to Standard, Placid, or Arkansas Gas Company, former customers of CVOC.

While Ohio and Hunt guaranteed delivery of distillate to Premier, the distillate, which is delivered, is from CVOC as a group. Records of Premier will show decrease in delivery of distillate. Butler, as manager of CVOC, sent out contracts for purchase of butane and propane by Warren Petroleum Company. Woodley signed this contract since it did not relate to refining but refused to sign Triangle contract since Triangle was acting as a broker for the marketing of gasoline. Woodley also refused to sign contract with Coast Oil leasing plant to CVOC.

Parten was not present at September 1945 meeting. Woodley was represented by M. E. Sandlin who objected to refining operations.

(3) Mr. Marlin E. Sandlin, Woodley Petroleum Company, Houston, Texas, made the following statement on January 29, 1946:

Mr. Sandlin attended meetings of CVOC, particularly one on September 13, 1945 at which there was a discussion about CVOC going into the refining business. This meeting was called pursuant to a letter from Butler outlining a plan to produce gasoline, kerosene, propane, butane, and isobutane. Sandlin concluded that plan was not within scope of agreement but violated antitrust laws and voted against it. H. D. Handley, representing Magnolia, also voted against it. Ohio and Union Producing Company refused to vote but over 50 per cent of the producers voted in favor of it. Sandlin stated his reasons for being against the plan and sought to have them put in the minutes but they were not recorded.

Although Magnolia voted against the plan on September 13, 1945 and Ohio and Hunt failed to vote at that time, later on September 25, 1945 they all voted in favor.

Sandlin noted that Ohio and Hunt took an active part in promoting the refining activities. It was brought out at the meeting that CVOC would not furnish Premier with any distillate after the termination of the nine-month postwar period and further that Premier had offered to pay CVOC 50 per cent of Premier's profit on all refined products if they could continue to receive distillate. No action was taken on this

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offer. Sandlin feels that Butler in his anxiety to make more money for CVOC would like to put Premier out of business. Prior to the meeting of September 13, 1945 Sandlin had a talk with Frommer about the plan, stating to him that he thought the plan would violate the antitrust laws and result in putting Premier out of business. Frommer indicated that that was of no concern to the Ohio Oil Company.

Sandlin saw no objection to the Warren contract but refused to sign with Triangle, feeling that the attempt to market products through Triangle acting as broker was an attempt to get around the direct marketing of
278 gasoline. He advised against Coast Oil contract for lease of plant for blending, pumping, leading, storing, shipping, etc., of gasoline and allied products.

At a meeting of September 25, there was some discussion about a pipeline but the operators felt that CVOC would violate the antitrust laws if they owned a pipeline. They set aside $35,000 which Sandlin believes was to be loaned to Coast to construct a pipeline to be used by CVOC. When CVOC closed down its plant in August 1945, this action compelled Premier to close down, as they could get no distillate.

(4) Statements obtained during interviews with Sylvester Dayson, President, R. P. Hargis, Secretary and Treasurer, and John Melton, Comptroller of Premier at Longview, Texas:

Premier built a plant at Cotton Valley on the verbal assurance of officials of Ohio, Hunt, Oliphant and Union Producing that it could obtain a supply of oil and distillate for its future operations. The plant was constructed for the refining of specialty products such as naptha and commercial solvents. Premier has had a contract with the American Mineral Spirits Company of Chicago, a distributor of naptha and solvents. Premier was requested to secure a market for the by-products of the recycling process and thereafter secured a contract with the government for the construction and operation of a 100 octane gasoline refinery. This plant, which is the property of the Defense Plant Corporation, is now closed.

Premier constructed the plant over the objection of Butler, Manager of CVOC, who wished to construct the plant. Premier had contracts with Hunt and Ohio for their production amounting to 60 per cent of the field. Premier did not have contracts with other op-

erators in the field as they did not consider them necessary since the PAW could allocate 100 per cent of the Cotton Valley production to the government plant when completed. Before the completion of the 100 octane plant, CVOC began constructing a toluene plant. Premier protested to O. P. C. that this was a duplication of facilities. Premier contended that its specialty plant could produce toluene and so could the Standard Oil Company at Baton Rouge which was connected with Cotton Valley by pipeline.

Premier argued among other things that it could not use distillate from which toluene had been removed in its specialty plant. It was at this point that the PAW suggested an agreement between Premier, Ohio, and Hunt to supply a certain amount of distillate for a period ending nine months after the war.

The contracts with Ohio and Hunt were the only ones in writing that Premier had with the operators. Purchases from the other operators was an open Division Order. Payment was made according to a
279 percentage of each one's production of the entire amount taken from Cotton Valley. The percentage figures were furnished Premier by CVOC. Premier then calculated the amount due each and sent a check for that amount to the individual operators.

CVOC produced toluene in its plant until there no longer was a shortage. Then it was suggested that CVOC enter the gasoline refining field using the toluene plant. This was in August 1945. Butler sent letters to all operators outlining the plan of reconversion and calling the meeting of September 13, 1945. He also transmitted a letter from Coast explaining the availability of the Coast facilities. In one letter Butler referred to the Premier's call on the Ohio share of production until nine months after the war, and stated that if the proposal for manufacture of gasoline were approved, no crude distillate would be available to Premier at the end of that period and presently not available to Placid for Coast Oil or Arkansas and Standard Oil Company.

In the meeting of September 13, a decision to go into the refining business was reached and the field was shut down for 30 days to reconvert the toluene plant into a plant to make gasoline and other such products. Woodley did not join in the refining operations and is

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delivering its share of approximately 2.7 per cent of the field's capacity to Premier.

Dayson said he knew of no facts indicating any attempt on the part of Standard to impair Premier's position. According to Dayson, the market price of the crude oil at Cotton Valley was by custom established by Standard Oil of Louisiana. At the request of Butler, Premier raised its price 10¢ per barrel to $1.40 effective September 1, 1941. The OPA subsequently froze the price of oil at $1.40 per barrel.

Regarding the Project #5 Pipeline from Eldorado, Arkansas, to Helena, Arkansas, Mr. Dayson stated that Premier owns 25 per cent of this line. His own gathering lines are installed in the Cotton Valley field.

(5) Statement obtained from J. Howard Marshall, President, Ashland Oil and Refining Company:

He stated that in March 1942 he was General Manager for PAW when Butler, Dalton, and Gee of Ohio attempted to influence him to cancel the contract between Premier and R. F. C., informing him that it was their desire to "force Premier out."

He also discussed price agreements with Butler for pentane and butanes. The OPA controlled the price of distillate by placing a ceiling on it.

Marshall stated that written memoranda are on file at the legal division at Washington, D. C., in connection with meetings held on price agreements between CVOC and Premier and construction of the CVOC
280 toluene naptha plant, which he definitely considered unnecessary as there was not at that time a scarcity of toluene and this was a duplication of facilities.

(6) H. D. Hanley, Petroleum Engineer, Magnolia Petroleum Company, made the following statement in the presence of Charles B. Wallace, Attorney for Magnolia, on February 18, 1946:

Production in Cotton Valley began in 1922. Another horizon was found in 1926. The horizon for present production opened in 1937. Magnolia has been an owner in the field for many years. At one time had its own pipeline gathering system attached to its own wells and others from whom it bought petroleum. It was connected with a larger pipeline which ran to Eldorado, Arkansas, by way of Sarepta, Louisiana. The petroleum was routed to Beaumont, Texas, where Magnolia's largest refinery is located. When Project

5 was organized, a part of this pipeline was taken over by it. Magnolia then sold its Sarepta pipeline to Premier.

Under the CVOC agreement for conservation purposes a recycling plant was operated producing butane, iso-butane, and a liquid known as butane free distillate. These were used by Premier in operating the government-owned 100 octane gasoline refinery. He recounted the September 13th meeting and the event leading up to it and stated that Magnolia voted against the proposed plan for purely business reasons and not from fear of violating the antitrust laws. He stated at the meeting that if they did manufacture gasoline, it would be necessary for Butler to have an agency contract with each operator authorizing him to sell. At the present time Butler has no authority to sell anything for Magnolia.

CVOC has arranged to rent facilities of Coast Oil Company for $2,500 a month. Each operator has the right to receive the end product in kind, if he desires, but in practice they sell their portions to Triangle which takes title at the Cotton Valley plant. CVOC has constructed a pipeline to Sarepta. It parallels the line Premier bought from Magnolia. Magnolia has a separate contract for sale of gasoline to Triangle. Butler has no authority to sell anything for Magnolia. The market price of crude oil was determined at Cotton Valley by posting of a price by anyone desiring to purchase. Usually Standard of Louisiana and other purchasers go along in meeting this price.

(7) Mr. John R. Butler, General Manager of the Cotton Valley Committee, made the following statement:

Prior to becoming General Manager of the Committee, he was employed by the Ohio Company and was in charge of operations conducted by the company in the C. V. Field. He stated that he severed all connections with Ohio Oil Company when he became Manager of the Committee.

281 Mr. Butler furnished general information relating to the purpose of the Committee and a rather technical explanation of the operation of the toluene naptha plant. He also described his negotiations with the government agencies in connection with the construction of that plant. He stated that the application for priorities was approved, which permitted the toluene addition to be completed about May 15, 1943. Butler

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states that the toluene concentrate refined at the plant was delivered to the Warren Petroleum Company in Tulsa, Oklahoma, for shipment to the Pan-American Refining Company Texas City plant. He advised that the material was used in the manufacture of explosives and aviation gasoline and that the price of this production was fixed by the Ordnance Department of the United States Army on a sliding scale formula based on purity. The manufacture of toluene concentrate increased the gross income of the plant approximately $2,000 per day. The manufacture of this product was discontinued about August 26, 1945.

Butler was questioned in detail concerning the present and past relationship between the Committee and the DPC plant in Cotton Valley. He referred to the minutes of Committee meetings dated September 11, 1941, October 20, 1941, September 10, 1941, and to a letter dated October 23, 1941 to all operators from the Committee. The minutes of these meetings and the letter were relative to consideration by the Committee of marketing butane particularly with the Premier Oil Refining Company.

A letter dated November 7, 1941 to all the operators indicated that the Premier proposal was only one of several similar propositions. Butler claimed that officials of Hunt and Ohio were called to Washington in January 1942 and were more or less forced by the OPC to make commitments to the Premier Company on Hunt's and Ohio's percentages of the Cotton Valley production. Butler furnished copies of a contract and two letters in connection therewith between Premier and Hunt and Ohio. Butler was questioned relative to the conversion to manufacture of gasoline. He stated that the plant received cancellations of the sale of butanes, pentanes and toluene concentrate which resulted in a temporary showdown of the Cotton Valley plant. In this connection he referred to September 1945 meeting in Shreveport. Butler also furnished information concerning the lease of the Coast Oil Plant by Cotton Valley.

Mr. Butler advised that the CVOC at that time was disposing of its gasoline and related products through the Triangle Refineries, Houston, Texas, and the Warren Petroleum Company, Tulsa, Oklahoma. He advised that both of the above companies are marketing brokers and handle the disposition of CVOC products

on a "percentage basis." Mr. Butler advised the contracts between these two companies and the operators were identical in all pertinent respects. He furnished copies of the contracts between the various operators and Triangle Refineries, for reference purposes. Mr. Butler further advised that the CVOC has no control whatsoever over the price, or prices at which the CVOC products are sold by the two brokers referred to
282 above. He also stated the CVOC had no control relative to what companies would, or could, purchase the finished product. It was ascertained that Mr. Butler had even employed the services of a Certified Public Accountant to review the records of the Triangle Refineries for the purpose of ascertaining if Triangle was "doing a good job" and selling CVOC products at prices in line with, or as high as, prices received for similar products sold by Triangle for manufacture and refineries in addition to the Cotton Valley Operators Committee. It was further ascertained that the examination conducted by the Certified Public Accountant referred to above had revealed that the Triangle Refineries were selling CVOC products in line with and in open competition with similar products manufactured by other companies.

Information furnished by Butler relative to price obtained for distillate was similar to that obtained from C. H. Whitman of Standard Oil Company. A ten-cent increase by Premier in September 1941 was made at Butler's insistence. As manager of CVOC, he personally contacted purchasers in an attempt to get price increased. Other purchasers of distillate met the increase almost immediately. No promise of any kind was made to Premier to get the increased price. Sales of distillate were discontinued when CVOC began manufacturing gasoline with the exception of Premier who continued to receive between 65,000 to 75,000 barrels a month. This was possible at that time since facilities of CVOC were not capable of turning entire production into gasoline and related products. As soon as facilities were available, Butler said the entire production would be turned into gasoline, etc., and no distillate would be available to any purchaser.

Butler said the "letter agreement" dated December 6, 1942 between Premier and Ohio would not be lived up to when the facilities for complete manufacture

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became available. Butler stated that if it became more profitable to manufacture distillate than gasoline the plant would revert and all purchasers would be given an equal chance to buy.

(8) Jack Coast of Coast Oil Company made the following statement:

He and one J. R. Queries formed the company in April 1943 when they purchased the assets of the Evansville Oil Company. Mr. Roy Lee assured Coast that he could depend upon a supply of distillate from C. V. feed stock supplied by Placid. A sufficient supply of distillate and crude was received from C. V. from 1940 to September 1945. Shortly after V-J Day, the plant was shut down and Placid was unable to obtain distillate. It was then rumored that CVOC was making plans to manufacture gasoline, etc. If this were done, Coast's plant would be practically worthless, so he sought to make a deal with CVOC for the use of his plant. After negotiating through Butler, Coast was able to lease his plant to CVOC for $2,250 per month for the year 1946 with a 30-day cancellation clause.

The former income from the Coast plant was $12,500.

Coast stated that his lease with CVOC has been can-
283 celled and he is now attempting to operate his plant.

(9) Mr. M. W. Boyer, Vice-President and General Manager in charge of all activities relating to Cotton Valley for Standard Oil Company of New Jersey (La. Dist.), made the following statement:

Five companies operate pipelines near Cotton Valley. They are Standard, Magnolia, Placid, Gulf, and Premier. Standard purchases distillate on "open division order" subject to immediate cancellation. If unable to get it from one source, they can usually get it elsewhere and transport it by pipeline or tank car to Baton Rouge. Standard has not been buying distillate from CVOC since their plant was converted to gasoline, etc. The posted price for distillate in any field is usually set by major company and the others follow. Usually the same as in nearby fields. Price of distillate unchanged since September 1, 1941 since it was "frozen" by OPA.

(10) Statement of C. H. Whitman and John T. Paul, Manager and Assistant Manager of crude oil purchases of Standard. Mr. Powell A. Casey of legal department was present.

These informants stated that Standard had a producing interest in Cotton Valley but used it only in August 1940 and then transferred this interest to Placid and Oliphant. Standard purchased distillate from CVOC from June 29, 1940 to December 1, 1945. Since that time they have been unable to purchase anything except a residuum product.

(11) Roy Benoit and J. P. D'Artois, attorneys for Ohio Oil Company, made the following statement:

These informants gave a summary of the history leading up to the building and putting into operation the Cotton Valley Recycling and Pressure Maintenance Plant. This summary included reference to legislation and Louisiana Department of Conservation Orders. After giving the general background information, these men stated that Mr. Butler was no longer connected with the Ohio Oil Company but had severed all connections when he became manager of the CVOC. They stated it was Butler's duty to supervise the personnel administrative and operative functions of the CVOC and that any change in policy had to be approved by a majority vote of the operators. Mr. Benoit stated that Butler frequently contacts D'Artois and himself for legal advice and Mr. W. F. Dalton for industrial and engineering advice.

These men stated that they had taken care that the actions of the CVOC would not result in violating the antitrust laws or making CVOC a taxable association.

They further stated that one of the reasons for
284 effecting contractual arrangements with Triangle Refineries was to avoid a possible violation of the antitrust laws. They stated their interpretation of Article 11 of the Cotton Valley Unitization and Pressure Maintenance Agreement and called attention to the fact that the entire unitization project had been conducted in accordance with good business principles with the various orders issued by the Louisiana Department of Conservation.

Both informants advised that they were in attendance at the meeting of CVOC when the manufacture of gasoline and related products was decided. In regard to this they set forth Mr. Sandlin's objections to the proposed manufacture. They further stated that CVOC had not loaned money to the Coast Oil Company to build a pipeline. They stated, however, a pipe-

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line was built from the CVOC plant to Sarepta, Louisiana, by CVOC. Both informants denied having any knowledge concerning the sale of crude oil at uniform prices or the sale of crude oil to one company exclusively.

(12) D. M. Healy of the Louisiana State Department of Conservation, Baton Rouge, Louisiana, made the following statement:

Cotton Valley field originally unitized under Act No. 225 of 1936. A new conservation act No. 157 was passed by the legislators of the State of Louisiana during 1940 and is still in effect. Mr. Healy advised the gas-distillate wells in the Cotton Valley unit are regulated by and operated under conservation acts and orders just the same as other oil and gas wells throughout the State of Louisiana. He stated that to the best of his knowledge the various actions taken by the CVOC pursuant to the Cotton Valley Unitization and Pressure Maintenance Agreement are entirely legal in so far as the State of Louisiana is concerned.

(13) Mr. T. W. McGuire, who replaced Butler as General Manager on June 1, 1946, made the following statement:

He referred to letter of Attorney General dated June 14, 1946, requesting elimination of practices of CVOC. A meeting was called to discuss the letter. McGuire pointed out that the manufacture of gasoline, etc., nets the individual operators approximately 30¢ per bbl. more than the manufacture of distillate. McGuire described the operation of the plant.

All CVOC operators, including Woodley, have contracts with Warren for the disposal of L. P. G. (isobutane, iso-pentane, normal butane). All operators with the exception of Woodley have contracts with Triangle for the sale of gasoline, etc. The unmarketable residuum is sold to Standard on "open division order." CVOC has not had any crude oil for sale since 1943. Woodley requested that their pro rata share of the end product be reblended and delivered to Premier as stabilized distillate.

285 McGuire takes position that Unitization Agreement is flexible and does not prohibit manufacture of gasoline, etc.

CVOC at government's request met and voted to manufacture toluene concentrate and spent $450,000 to revamp plant. At the time one consideration was

that "from an engineering standpoint this particular section of the CVOC plant could be very easily converted after the war for the manufacture of gasoline, etc., at a minimum expense."

After the war CVOC was shut down as there was then no market for toluene which had been 80 per cent of production. On September 13, 1945 they held a meeting and decided to manufacture gasoline, etc.

Mr. McGuire stated that a resume of the operations of the plant furnished by L. H. Oliver, Jr., Chief Chemist and Chemical Engineer of CVOC, was the complete process; that any petroleum engineer studying this method would understand that the unitized substances are not being retained. That CVOC is operating its plant in the most practical manner possible and pursuant to the Louisiana conservation laws which recommend their present method of operation.

The General Manager is in reality an agent for each individual operator but has no authority to obligate the respective operators by executing contracts. All contracts that the Cotton Valley Operators have are entered into and executed by each individual operator. The operators in turn notify the general manager of the CVOC that they have executed a contract for their pro rata share of the production and the general manager is instructed to deliver their product in kind to the respective purchasers. McGuire receives letters almost daily from would-be purchasers of Cotton Valley products. He usually advises the writers that all products are under contract and explains the expiration date. He has no authority to make a sale or execute a contract, but he frequently acts as a go-between.

(14) Mr. Paul Goodwin, Chief Accountant for CVOC, made the following statement:

CVOC is not retaining the unitized substances but that each operator's product in kind is delivered at the most practical and economical point pursuant to the terms of the agreement. When the unstabilized distillate enters the inlet side of the plant, a continuous and completely closed process is begun. That no operator's product can be delivered in kind except on the outlet side where the finished products are propane, iso-butane, normal butane, pentane hexane, gasoline naptha, kerosene, fuel oil and residue.

The only way Woodley can obtain their pro rata share of their product in kind, which is only 2.86 per

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cent, is by blending these products and delivering the mixture to Premier as stabilized distillate. The operators are paying the royalty owners their ⅛ interest according to the market price of distillate. This was frozen by OPA at $1.40 per bbl. but recently was released from the price list.

286 (15) Mr. Forrest W. Lowry, President; Mr. Jack Manley, Vice-President; and Mr. H. Pearson, Comptroller, of the American Mineral Spirits Company, Chicago, Illinois, made the following statement:

The American Mineral Spirits Company had suffered considerable losses as a result of the interruption of their contract with Premier Oil Refining Company and furnished tabulations of their purchases.

(16) Mr. Paul M. Raigordsky, formerly in charge of Natural Gas and Natural Gasoline Section of PAW, made the following statement:

He advised that CVOC producers had not, to his knowledge, asked unreasonable prices for butane and iso-butane to be supplied Premier; and that the asking price was approximately one-half cent per gallon above that finally agreed upon. He had no knowledge of CVOC's efforts to have Premier's RFC construction contract canceled or breached. Advises that CVOC presented plans for construction of toluene installation in reply to PAW's general appeal to the industry for immediate production of toluene; and that thirty to sixty days after CVOC had been advised to proceed and had started construction, Premier entered its protest. After several meetings, attended by CVOC and Premier representatives, where detailed plans were produced by both parties relative to the toluene installations, it was decided, primarily because time was of the essence, that CVOC should continue construction. Agreement for supply of distillate by CVOC to Premier was suggested by J. Howard Marshall, as recalled by Raigorodsky, with final details arranged by the contracting parties since PAW had no authority to force the parties to enter this agreement.

(17) H. L. Hunt, President of Hunt Oil Company, made the following statement:

He stated, in answer to questions, that he was unable to recall any specific contact or visit with him by officials of Premier in connection with supply of distillate to Premier at the time Premier was contemplating the

construction of a solvent naptha plant near Cotton Valley, Louisiana, but did state, however, that such a contact on the part of the Premier Company would have been a logical step for that organization to take and he was under the impression that such a contact was probably made by representatives of the Premier Oil Refining Company of Texas. He also stated that he did not recall ever having given the Premier Oil Refining Company any definite promises or assurances that they would receive a supply of distillate for a definite period of time if a solvent naptha plant was erected at Cotton Valley by Premier.

(18) Mr. C. H. Whitman, Manager, Crude Oil Purchasing Department, Esso Standard Oil Company, Shreveport office; Mr. Walter B. Fulton, retired, former Chief
287 Engineer of Interstate Pipe Line Corporation; Mr. John Everett, Counsel, Shreveport office, Esso Standard Oil Company; and Mr. Cecil Morgan, Associate General Counsel, Esso Standard Oil Company, made the following statement:

In 1938 Standard laid a 4-inch pipeline from its gathering system in the Cotton Valley field to Weller Station which had connections at Moore Station to the Interstate Pipe Line System. At this time everything that came out of the wells was sent through the pipeline and mixed with crude coming from other points, the destination being the Baton Rouge refinery. This Cotton Valley distillate production could have been sent separate (in other words, "batched") through the same line without increasing or decreasing pressure. In fact, at this time there were two sands, one containing natural distillate and the other crude. Products from both were sent through the same 4-inch line to Weller Station. In 1938 there was approximately a 2 per cent loss of light ends either moving as a straight product or a mixed product. This was not considered a serious loss by the Esso Standard Oil Company. The capacity of the line in 1938, working on a 24-hour basis, was 14,000 barrels a day.

In 1940 Cotton Valley distillate was coming through the line with all light ends except propane and 5 per cent butane which were taken out by the Cotton Valley Operators Committee Plant. Composition of distillate at this time contained 13 per cent butane so that 8 per cent of the butane remained in the mixture which was transported to the refinery. Had the plant not taken

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off the propane it would have been flared inasmuch as the Standard Oil Company did not want propane or pure gas in its pipeline. The propane taken off by the Cotton Valley Operators Committee was sold by the Warren Petroleum Company.

In 1941 another 4-inch pipeline, parallel to the first one, was laid between the gathering system and Weller Station. This line was used for transportation of distillate and the first line was used for transportation of crude. In the same year Standard began to mix the Cotton Valley distillate with Talco crude, a very heavy lubricating oil base stock, and this mixture was transported to the Baton Rouge refinery. With the new pipeline operating, the distillate was put in separate tanks at Weller Station where it was stored at atmospheric pressure. It was then transferred by pipeline to Moore Station in batches and mixed with Talco crude or other line products.

After no distillate was available, by reason of the construction and operation of the Cotton Valley Operators refinery, both pipelines were used for the transportation of crude from the Cotton Valley field. In 1947 one of the pipelines was taken up and used in another field leaving the capacitp of the pipeline from Cotton Valley to Weller Station approximately 7,000 barrels per day. At that time and at the present time the pipeline was running on a 12-hour day rather than a 24-hour basis.

288 In 1938 distillate was purchased from each individual owner on an open division order basis with a 48-hour cancellation clause in the order. In 1940 Standard had individual contracts with each operator which were in the form of open division orders but contained clauses which took into account the fact that the recycling plant would soon be in operation and the disillate would be in common storage. When this took place the contracts were still in force and are so today. However, after Mr. Butler became the manager of the plant, he handled all selling of the products and negotiated with prospective purchasers. In 1941 Mr. Butler went to Baton Rouge and New Orleans to discuss with Mr. Rathbone, President of Standard Oil of Louisiana, the possible purchase by Standard of 4,000 barrels per day of Cotton Valley distillate. This purchase arrangement was put into effect. Mr. Butler,

from time to time, called on Mr. Whitman to negotiate for higher prices for the Cotton Valley distillate. Payment for the production was made to each individual operator by applying percentage figures, supplied by Butler, to the total amount distillate received by Standard. Even though Butler would not sign any contracts of sale, he did in his capacity as manager of the Cotton Valley Operators Committee act as common selling agent for the various operators in the field.

The distillate product of Cotton Valley is a premium product and provides a better base for the manufacture of gasoline than most crude oils. The distillate is very good for the manufacture of higher octane gasoline as well as light end products. Mr. Whitman stated that today he would accept all the distillate he could receive even though the light ends were removed, and, in fact, would accept a mixture of the refined products similar to that being sent to Woodley Petroleum Company. Mr. Whitman was asked if he continued to post a price for distillate in the Cotton Valley field even though no distillate was available. He stated that they continued to post for two reasons: (1) the price was used for a base for other fields, and (2) it would be there in case any distillate was available at any future time. He stated that the question was raised by the Cotton Valley Operators Committee as to why Standard continued to post a price but his memory failed him as to who made the inquiry, when it was made, and what answer he gave.

INTERROGATORY No. 13

All acts or declarations of the co-defendants of this defendant, or alleged co-conspirators of this defendant, whether parties or not, reflected in or by the documents enclosed herewith and in the answers to the other interrogatories propounded by defendant Magnolia Petroleum Company, are relied upon by the plaintiff to establish in part that the defendant Magnolia Petroleum Company entered into the alleged combination and conspiracy.

289 INTERROGATORIES Nos. 14 AND 14-A

Plaintiff contends that the alleged combination and conspiracy is evidenced in part by participation of this defendant in those meetings of the Cotton Valley Operators Committee and its Subcommittees as shown in the copies of the minutes of the Cotton Valley Operators Committee and its Subcommittees enclosed herewith.

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INTERROGATORIES NOS. 15 AND 15-A

Plaintiff contends that the alleged combination and conspiracy is evidenced in part by those minutes and resolutions of the Cotton Valley Operators Committee and its Subcommittees shown in the copies of the minutes of the Cotton Valley Operators Committee and its Subcommittees enclosed herewith.

290 INTERROGATORIES RELATING TO THE ALLEGED MONOPOLY

The complaint alleges a single combination and conspiracy to restrain and to monopolize. The complaint alleges neither monopolization nor a separate conspiracy to monopolize. The answers to interrogatories 1 through 15-A, relating to the single combination and conspiracy here involved, are therefore equally applicable to interrogatories 16 through 30-A relating to the monopolistic aspect of that single conspiracy. The specific answers to interrogatories 1 through 15-A which are applicable to each of the interrogatories in the group 16 through 30-a are indicated below.

INTERROGATORIES No. 16 AND 16-A

Answers to these interrogatories are included in the answers to interrogatories No. 1 and 1-A above.

INTERROGATORIES No. 17 AND 17-A

Answers to these interrogatories are included in the answers to interrogatories No. 2 and 2-A above.

INTERROGATORIES No. 18 AND 18-A

Answers to these interrogatories are included in the answers to interrogatories No. 3 and 3-A above.

INTERROGATORIES No. 19 AND 19-A

Answers to these interrogatories are included in the answers to interrogatories No. 4 and 4-A above.

INTERROGATORIES No. 20 AND 20-A

Answers to these interrogatories are included in the answers to interrogatories No. 5 and 5-A.

INTERROGATORIES NOS. 21 AND 21-A

Answers to these interrogatories are included in the answers to interrogatories No. 6 and 6-A.

INTERROGATORIES No. 22 AND 22-A

Answers to these interrogatories are included in the answers to interrogatories No. 7 and 7-A.

291 INTERROGATORIES No. 23 AND 23-A

Answers to these interrogatories are included in the answers to interrogatories No. 8 and 8-A.

INTERROGATORIES No. 24 AND 24-A

Answers to these interrogatories are included in the answers to interrogatories No. 9 and 9-A.

INTERROGATORY No. 25

Answers to this interrogatory are included in the answers to interrogatory No. 10.

INTERROGATORY No. 25-B

Answers to this interrogatory are included in the answers to interrogatory No. 10-B.

INTERROGATORY No. 25-C

Answers to this interrogatory are included in the answers to interrogatory No. 10-C.

INTERROGATORY No. 28

Answers to this interrogatory are included in the answers to interrogatory No. 13.

INTERROGATORIES No. 29 AND 29-A

Answers to these interrogatories are included in the answers to interrogatories No. 14 and 14-A.

INTERROGATORIES No. 30 AND 30-A

Answers to these interrogatories are included in the answers to interrogatories No. 15 and 15-A.

292 INTERROGATORIES RELATING TO THE ALLEGED PRICE FIXING

The complaint alleges a single combination and conspiracy to restrain and to monopolize. The complaint alleges neither price fixing nor a separate conspiracy to fix prices. The answers to interrogatories 1 through 15-A, relating to the single combination and conspiracy here involved, are therefore equally applicable to interrogatories 31 through 45-A relating to the aspect of price fixing of the single conspiracy. The specific answers to interrogatories 1 through 15-A which are applicable to each of the interrogatories in the group 31 through 45-A are indicated below.

INTERROGATORIES No. 31 AND 31-A

Answers to these interrogatories are included in the answers to interrogatories No. 1 and 1-A.

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INTERROGATORIES No. 32 AND 32-A

Answers to these interrogatories are included in the answers to interrogatories 2 and 2-A.

INTERROGATORIES No. 33 AND 33-A

Answers to these interrogatories are included in the answers to interrogatories No. 3 and 3-A.

INTERROGATORIES No. 34 AND 34-A

Answers to these interrogatories are included in the answers to interrogatories 4 and 4-A.

INTERROGATORIES No. 35 AND 35-A

Answers to these interrogatories are included in the answers to interrogatories No. 5 and 5-A.

INTERROGATORIES No. 36 AND 36-A

Answers to these interrogatories are included in the answers to interrogatories 6 and 6-A.

INTERROGATORIES No. 37 AND 37-A

Answers to these interrogatories are included in the answers to interrogatories No. 7 and 7-A.

293 INTERROGATORIES No. 38 AND 38-A

Answers to these interrogatories are included in the answers to interrogatories No. 8 and 8-A.

INTERROGATORIES No. 39 AND 39-A

Answers to these interrogatories are included in the answers to interrogatories No. 9 and 9-A.

INTERROGATORY No. 40

Answers to this interrogatory are included in the answers to interrogatory No. 10.

INTERROGATORY No. 40-B

Answers to this interrogatory are included in the answers to interrogatory No. 10-B.

INTERROGATORY No. 40-C

Answers to this interrogatory are included in the answers to interrogatory No. 10-C.

INTERROGATORY No. 43

Answers to this interrogatory are included in the answers to interrogatory No. 13.

INTERROGATORIES No. 44 AND 44-A

Answers to these interrogatories are included in the answers to interrogatories No. 14 and 14-A.

INTERROGATORIES No. 45 AND 45-A

Answers to these interrogatories are included in the answers to interrogatories No. 15 and 15-A.

294 INTERROGATORIES RELATING TO THE ALLEGED COMMON SELLING AGENT

The complaint alleges a single combination and conspiracy to restrain and to monopolize. The complaint alleges neither a common selling agent nor a conspiracy relating to a common selling agent. The answers to interrogatories 1 through 15-A, relating to the single combination and conspiracy here involved, are therefore equally applicable to interrogatories 46 through 60-A relating to the common selling agent referred to in the single conspiracy. The specific answers to interrogatories 1 through 15-A which are applicable to each of the interrogatories in the group 46 through 60-A are indicated below.

INTERROGATORIES No. 46 AND 46-A

Answers to these interrogatories are included in the answers to interrogatories No. 1 and 1-A.

INTERROGATORIES No. 47 AND 47-A

Answers to these interrogatories are included in the answers to interrogatories No. 2 and 2-A.

INTERROGATORIES No. 48 AND 48-A

Answers to these interrogatories are included in the answers to interrogatories No. 3 and 3-A.

INTERROGATORIES No. 49 AND 49-A

Answers to these interrogatories are included in the answers to interrogatories No. 4 and 4-A.

INTERROGATORIES No. 50 AND 50-A

Answers to these interrogatories are included in the answers to interrogatories No. 5 and 5-A.

INTERROGATORIES No. 51 AND 51-A

Answers to these interrogatories are included in the answers to interrogatories No. 6 and 6-A.

INTERROGATORIES No. 52 AND 52-A

Answers to these interrogatories are included in the answers to interrogatories No. 7 and 7-A.

295 INTERROGATORIES No. 53 AND 53-A

Answers to these interrogatories are included in the answers to interrogatories No. 8 and 8-A.

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INTERROGATORIES No. 54 AND 54-A

Answers to these interrogatories are included in the answers to interrogatories No. 9 and 9-A.

INTERROGATORY No. 55

Answers to this interrogatory are included in the answers to interrogatory No. 10.

INTERROGATORY No. 55-B

Answers to this interrogatory are included in the answers to interrogatory No. 10-B.

INTERROGATORY No. 55-C

Answers to this interrogatory are included in the answers to Interrogatory No. 10-C.

INTERROGATORY No. 58

Answers to this interrogatory are included in the answers to interrogatory No. 13.

INTERROGATORIES No. 59 AND 59-A

Answers to these interrogatories are included in the answers to interrogatories No. 14 and 14-A.

INTERROGATORIES No. 60 AND 60-A

Answers to these interrogatories are included in the answers to interrogatories No. 15 and 15-A.

296 MISCELLANEOUS INTERROGATORIES

INTERROGATORY No. 61

The plaintiff contends that certain operations of the plant contributed to and became a part of the alleged illegal conspiracy on or about May 1, 1941.

INTERROGATORY No. 62

Plaintiff contends that the specific process or procedure at the Cotton Valley plant which rendered its operation illegal were as follows:

1. The agreement to and the joint construction and operation of facilities for the production of the following separate hydrocarbons and hydrocarbon products from the portion of the natural flow of the field and not reinjected therein: butane mixture, iso butane, normal butane, isopentane, normal pentane concentrate, propane and butane mixture.

2. The construction of facilities for the production of toluene concentrate with intent to convert said facilities to an illegal purpose after the war.

3. The joint production since about November 1945 of gasoline (including unleaded, regular, and premium), kerosene, fuel oil, residue, and kerosene residue mixture.

INTERROGATORIES No. 63 AND 64

Plaintiff contends that the physical equipment of the plant when used for the purpose of the production referred to in answer to interrogatory No. 62 became illegal and that the activities of the defendants in so using the facilities should be enjoined by the court.

INTERROGATORY No. 65

The plaintiff does not contend that any of the physical equipment of said plant should be shut down but that its use should be changed so as not to further or promote the illegal production referred to in answer to interrogatory No. 62.

INTERROGATORIES No. 66, 66-A, 67, 68, 68-A AND 69

The plaintiff is without information or knowledge as to whether the defendant Magnolia Petroleum Company
297 is now agreeing on prices of its products produced through the CVOC plant. Plaintiff does have in its possession, however, letters to Triangle Refineries, Inc. and Warren Petroleum Corp., both dated May 29, 1947 which purport to cancel the contracts and agreements between defendant Magnolia Petroleum Company and these two corporations.

298 MISCELLANEOUS

Plaintiff further contends that the acts, declarations, contracts, agreements and understandings of the defendants in furtherance of the alleged illegal combination and conspiracy and parts thereof are referred to in the following documents which the plaintiff relies on in part:

Report of public hearing held by the Department of Conservation of Louisiana *in re* Cotton Valley Oil Field, June 12, 1940.

Report of conference held by the Commission of Conservation of the State of Louisiana at 239 Royal Street, New Orleans, on July 1, 1940, *in re* Cotton Valley Field.

Report of public hearing of the Cotton Valley Field held in the Lecture Hall of the Presbyterian Building, New Orleans, on January 28, 1941.

Report of conference relating to the construction of a toluene plant at Cotton Valley, Louisiana, held in the Department of the Interior Building, Washington, D. C. on November 6, 1942.

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All of the following reports and statements issued by the Cotton Valley Operators Committee from January 1, 1941 to date:

Allocation of Expenses
Receipts and Disbursements Statements
Allocation Statements
Allocation of Toluene Naphtha
Statements and Schedules relative to Gas and Gasoline revenue
Allocation of Oil and Distillate runs
Temporary Plant Operations
Reconciliation of Inventory on hand
Oil and Distillate Statement
All other statements and reports issued by the Cotton Valley Operators Committee to the defendants relative to production, receipts, disbursements, revenue, allocations, and royalties.

In respect to each of the foregoing answers, the plaintiff states that it has answered fully on the basis of the information presently in its possession. Plaintiff further states that in the course of its preparation for trial it will undoubtedly obtain additional information sought by these interrogatories. As soon as such additional information is obtained supplementary answers covering such information will be supplied to defendant Magnolia Petroleum Company.

299 VERIFICATION

Daniel B. Britt and Willard R. Memler, being duly sworn depose and say that they are attorneys for the plaintiff, the United States of America in the above entitled case; that they have been specially designated by the Attorney General of the United States to prosecute this cause of action; that they have examined all of the documentary evidence as well as all other evidence, presently in the possession of the plaintiff; that the above answers to the interrogatories propounded by defendant Magnolia Petroleum Company are based upon deponents' examination of this evidence; and that to the best of their ability they have true answers made to said interrogatories.

S) DANIEL B. BRITT
Daniel B. Britt
Special Assistant to the Attorney General

S) WILLARD R. MEMLER
Willard R. Memler
Special Attorney

Subscribed and sworn to before
me this 9th day of May, 1949.
WALTER W. DOSH
Notary Public

(File Endorsement Omitted)

300 COPY

In United States District Court

(Title Omitted)

Answer of A. G. Oliphant, Allene Oliphant, Charles W. Oliphant, H. W. Perritt and E. V. Whitwell —Filed May 11, 1949

A. G. OLIPHANT, ALLENE OLIPHANT, CHARLES W. OLIPHANT, H. W. PERRITT and E. V. WHITWELL, some of the defendants in the above entitled and numbered action, sometimes hereinafter referred to in the singular as "this defendant", with full reservation of all of their rights under prior motions filed by them, in answer to plaintiff's complaint, as amended by its More Definite Statement and Second More Definite Statement, respectfully say:

• • • • •

(File Endorsement Omitted)

301 COPY

In United States District Court

(Title Omitted)

Answer of Defendant, W. A. Delaney, Jr.—Filed May 11, 1949

W. A. Delaney, Jr., one of the defendants in the above entitled and numbered action, with full reservation of all of his rights under prior motions filed by him, in answer to plaintiff's complaint, as amended by its More Definite Statement and Second More Definite Statement, respectfully says:

• • • • •

(File Endorsement Omitted)

302 Copy

In United States District Court

(Title Omitted)

Answer of Sunray Oil Corporation—Filed May 11, 1949

SUNRAY OIL CORPORATION, one of the defendants in the above entitled and numbered action, with full reservation

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of all of its rights under prior motions filed by it, in answer to plaintiff's complaint, as amended by its More Definite Statement and Second More Definite Statement, respectfully says:

Note: (This defendant acquired its interest in the Cotton Valley Field by virtue of the merger into it of Superior Oil Corporation, which owned only one forty acre lease with a producing well on it prior to the formation of Cotton Valley Unitization and Pressure Maintenance Agreement, Superior Oil Corporation was a party to said Agreement, but this defendant was not. Accordingly, the following answers to the complaint are, in the most part, necessarily based on information and belief.)

(File Endorsement Omitted)

303 COPY

In United States District Court

(Title Omitted)

Answer of Defendant Union Producing Company—Filed May 11, 1949

Union Producing Company, one of the defendants in the above entitled and numbered action, with full reservation of all of its rights under prior motions filed by it, in answer to plaintiff's complaint, as amended by its More Definite Statement and Second More Definite Statement, respectfully says:

* * * * *

(File Endorsement Omitted)

304 COPY

In United States District Court

(Title Omitted)

Answer of Cotton Valley Operators Committee—Filed June 10, 1949

COTTON VALLEY OPERATORS COMMITTEE, defendant herein, appearing under the compulsion of the Court's decision on the motion of J. J. Frommer to quash process and service of process, reserving all rights under, and reasserting all contentions made in, the said motion, answers plaintiff's complaint, as amended by its More Definite Statement and Second More Definite Statement, as follows:

* * * * *

(File Endorsement Omitted)

Note: The complete Answer of Cotton Valley Operators is included in transcript on designation by that defendant. Page 381.

305 COPY

In United States District Court

(Title Omitted)

Answer of Defendant Midstates Oil Corporation—Filed May 26, 1949

Midstates Oil Corporation one of the defendants in the above entitled and numbered action, with full reservation of all of its rights under prior motions filed by it, in answer to plaintiff's complaint, as amended by its More Definite Statement and Second More Definite Statement, respectfully says.

• • • • •

(File Endorsement Omitted)

306 In United States District Court,
Western District of Louisiana,
Shreveport Division.

(File Endorsement Omitted)

UNITED STATES OF AMERICA,
VS.
COTTON VALLEY OPERATORS COMMITTEE, *et al.*

No. 2209 Civil Action

Transcript of Hearing—Filed June 16, 1949

Evidence adduced and proceedings had in the above entitled matter, June 15, 1949, at Shreveport, Louisiana, before The Honorable Ben C. Dawkins, Judge United States District Court, Western District of Louisiana.

APPEARANCES:

Daniel R. Britt, Anti-Trust Division, Washington, D. C. Attorney for the Government.

J. R. Goff, Attorney for Hunt Oil Company, *et al.*

John M. Madison, Attorney for Union Producing Company, *et al.*

David E. Smitherman, Attorney for North American, *et al.*

Chas. B. Wallace and Dixon Carroll, Magnolia Petroleum Company.

S. M. Cook, Attorney for C. V. O. C.

Charles E. Egan, Attorney for C. V. O. C.

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C. F. Currier, Leon O'Quin and Arthur O'Quin, Ohio Oil Company.

Charles L. Black, Stanolind, *et al.*

Leslie Moses, Midstates Oil Corporation.

307 James D. Heldt, Bodcau Cotton Valley, Inc., and Grant Oil.

S. L. Herold, Jr., Woodley Pet. Co., *et al.*

The COURT: All right, gentlemen.

Argument on Behalf of Government

Mr. BRITT: May it please the Court, we are here today on a motion by the government to vacate an order made on March 11th on the motion of the Ohio Oil Company to require the government to produce reports made to the Attorney General by agents of the Federal Bureau of Investigation. The substance of the order was that the reports be submitted to the court for its determination as to whether or not they were privileged. The Attorney General, in an affidavit, has taken the position which is uniform throughout the country that the determination of whether these reports are privileged lies within his discretion exclusively.

The COURT: Mr. Britt, he hasn't had much luck with that contention in the last few days with Judge Reeves in the Coplon case.

Mr. BRITT: Nevertheless, I am instructed to urge the position which he takes and to further say this: I have gone to a great deal of personal work to do what I think will solve this situation without any possible prejudice to the defendants. I have gone through each report in the Justice Department files personally and from those reports I have had extracted—not my summary of what the agent says—but his own statement of any interview which he had with any witness and his references to any documents which he examined. All of the documents are available which the agent extracted from any place where

308 he made an examination and are now available for inspection and copying by the defendant. With respect to the reports themselves, I respectfully urge your Honor to permit me to retain the physical custody of the reports because in this extraction which consists of one hundred and seventy-five pages of legal size, I have extracted everything which an agent said about an interview. The only thing I have eliminated from the reports are technical procedural matters such as he would analyze a

memorandum which was written by one of us requesting a certain examination to be made, or where he related to other agents in other parts of the country setting out what we call leads to other offices which couldn't possibly have any bearing on the factual situation in this case, and then there are at least two occasions where an agent is an accountant and who had seen only a part of the case volunteered and put a gratuitous opinion and conclusion of his own with respect to the merits of the case and I have eliminated that but where he had an interview, whether it was favorable to the government or not, where he interviewed a man and said so and so informed me, then I have it copied verbatim and offer it to the defendants without regard of the question of the court examining it to determine whether or not it is privileged. As to this situation, the Attorney General stated he waives his privilege but he would like to keep his confidential instructions within the Department of Justice and it seems to me that is as fair a position as can be taken under these circumstances.

We are not hiding anything taken by an agent. Everything is here that could be taken from a report. I am willing to permit the court to compare this with the original reports which I have with me to determine whether or not I have made a correct extraction, but the Attorney
309 General has requested that offer be made on the condition that they not be turned over to the defendants.

I think we are making a complete disclosure of every possible relevant or irrelevant fact.

The COURT: You haven't up to this time submitted any copy of that to the opposing side?

Mr. BRITT: I have it here with me. I will be here until Friday and I wouldn't mind letting them examine it.

The COURT: Suppose we hear from them.

Argument on Behalf of Ohio Oil Co.

Mr. LEON O'QUIN: I think, your Honor, counsel's statement that they offer to tender what they have chosen to offer is an admission that they are withholding something. Undoubtedly, the only reason they could wish to withhold something is because it would be beneficial to these defendants.

The COURT: Not necessarily, Mr. O'Quin. You all read the newspapers and I have been keeping up fairly well with what is happening in other areas, such as I called Mr. Britt's attention in the Coplon case, and Judge Kennerly

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is another one who has a long splendid record of attainment has made his ruling in the Texas City case. He threatened somebody with jail if they did not comply with his order. I read that in the papers and I don't know whether there is truth to it or not.

I am not going to let my mind be prejudiced at all in this matter. The statement you were making that necessarily they were hiding something important to you, I don't think it necessary follows.

Mr. LEON O'QUIN: Your Honor, as I understood
310 it, they were supposed to have presented the report to your Honor.

The COURT: Mr. Britt came down at the time he failed this application and came to Monroe and told me he had those documents.

I am like the old Negro, I don't trouble trouble until trouble troubles me. I don't care to have my mind diverted to that from other work I am doing now and we will cross that bridge when we come to it, and if necessary, I will then look into it. The point I raised with you, it doesn't necessarily mean it is a matter of great importance to your side of the case simply because they don't want to produce it. You can't judge until you can see it. The thought was crystallizing in my mind while Mr. Britt was talking, it might be well for you gentlemen to take all he is offering and see whether you are satisfied with it.

Mr. ARTHUR O'QUIN: Your Honor, under the rule I think we are entitled to see. What he purports to say is to take what he thinks in the matter. We are entitled to anything that may give us information as to where we can obtain additional facts.

The COURT: The rule says that.

Mr. ARTHUR O'QUIN: Your Honor, I think we are enentitled to just as much from them as they have obtained from us. We are entitled to see those instruments themselves and we may obtain additional facts even though it may be a conclusion or opinion. It might give us a clue to get additional facts. Your Honor has given them all the protection they could possibly ask for. Your Honor says, "Submit it to me first." If there is anything detrimental to the government, your Honor will rule it out. If there is any particular document that claims a special
311 privilege, your Honor will rule it out, but I think we are entitled to get the document, not something they pick out and give to us. We may think what they pick

out and hold back is very material. A name might be mentioned. We are entitled under the rule to the document itself. We are either entitled to the document itself or we are entitled to nothing; and may I call the Court's attention and Counsel's attention that there is something in addition to the FBI reports which are asked for in this motion to produce. We have not only asked for these FBI reports but we have asked from them the same thing that they have already obtained from us.

In Paragraph 1 it refers to the FBI reports. Then, in Paragraph 2—and I may read their motion to produce, and it is almost identical with ours and theirs was granted and theirs have been complied with.

In Paragraph 2 we ask for all letters, telegrams and other communications of every kind or copies thereof together with copies of replies thereto received by the Department of Justice of the United States during the period extending from August 1st, 1945, to the date of institution of this action from private individuals, corporations or associations including parties to this action relating to methods of operations conducted by this defendant or any other defendant herein, alone or in association with other defendants or any number thereof in or in connection with the production, processing and manufacturing of liquid and gaseous hydrocarbons produced from the Cotton Valley Field of Webster Parish, Louisiana.

I say we are entitled to nothing more and your Honor granted that order.

Mr. BRITT: I don't understand that your Honor
312 did grant that order.

Mr. ARTHUR O'QUIN: Your Honor granted the whole order. The only thing they have been arguing about is the FBI reports. That is what they have asked for from us. I could read their motion and it is almost similar in language to the things we had. We have given them all the letters we received and all replies. We have given them everything. We have made our files open with everything we had.

Getting back to the thing he mentioned; that wouldn't do us any good at all. We are either entitled to those documents which they have so we can glean as much information as possible and not which they may say is factual. Your Honor is going to protect the government for anything that might be against the interest of the public and as some of the judges pointed out, this was a matter of housekeeping. It has nothing to do with diplomacy, or any secrets.

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I submit we are entitled to those instruments in full, everything they have in there. It says all the cards must be placed on the table and I say we are entitled to see all of them.

The COURT: All right, Mr. Britt.

Further Argument on Behalf of Government

Mr. BRITT: Your Honor, when this motion was argued originally and at the time when Mr. O'Quin moved to vacate the order, you will recall there was some confusion in mixing this order with the Magnolia order and they were both overruled. Then it was pointed out this motion was different than the Magnolia made. Then your Honor considered it with respect to that portion of it relating to the FBI reports and in the course of our hearing which
313 was on September 17th, 1948—I have the transcript in which Mr. O'Quin says, "Let me read what I asked for. I had no idea when this was prepared anything about good or bad faith entering into it and I think if you read what we have you will agree with me I didn't have any such idea. Here is our motion: I wish you would see how similar our motion is to the government's filed in this case. What do we ask for? All reports made by any agent or member of the FBI relating to methods of operations conducted by this defendant or any other defendant herein, alone or in association with other defendants in or in connection with the production, processing and manufacturing of liquid and gaseous hydrocarbons produced from the Cotton Valley Field of Webster Parish."

Then your Honor asked: "The beginning of that, don't you ask for the correspondence and telegrams, and whatnot, between the FBI and Attorney General, and so forth, as to the investigation of those matters as distinguished from the contents of the documents themselves? Read it again and let us see."

Then Mr. O'Quin reads, it is quoted, " 'Defendant the Ohio Oil Company moves the Court for an order requiring plaintiff to produce and permit defendant to inspect and copy: All reports made by agents or employees of the Federal Bureau of Investigation to the Attorney General or to the Department of Justice of the United States during the period extending from February 1st, 1946 to the date of institution of this action relating—' " and that was all that was said about it and then he says we have certain items listed.

That is the order that was discussed. It related to the first section of this motion and the letters which are
314 included in the second one was the same as the Magnolia motion which you denied for the reason you were seeking who brought this and what information they brought to bear on the government in a political way. The letters written to the Attorney General by people outside of the government who may be in the nature of informers, and the courts have protected informers. There is a Supreme Court case where the statement of an informer to the government need not be disclosed as a matter of discovery. These letters which are written to the Attorney General are entirely different than the letters we asked for which related to the operation of the doing of the business themselves. They have claimed a privilege to documents passed between the attorney and client. They have refused to permit us to examine the minutes of the legal committee of the Cotton Valley Association and we haven't made any further motion about it.

The COURT: Mr. Britt, do you think there is any change in the law today as to what it was before the rules of Civil Procedure on that point? I recall distinctly in the prohibition days and in trying criminal cases, I ruled where the informant was not used as a witness that the agent could not be compelled to disclose his name. That was a matter of policy in the proper enforcement of a criminal statute and since that evidence or information furnished by that informant was not to be used in the case, there was no reason for complaint on the part of the accused under those circumstances. But now, under the rules of Civil Procedure—those gentlemen of great experience and skills ruled in Civil Procedures and the dominating idea that ran through in preparing those rules was there was no reason in a civil lawsuit to have a battle of wits be-
315 tween counsel and the idea of laying the cards on the table and letting the case be decided on the merits as they existed rather than on the basis of what could be kept in or kept out of the case was the idea they adopted and wrote into those rules in large measure.

Do you think that has changed the principle you have suggested there, a complainant couldn't be compelled to disclose the name of the informers?

Mr. BRITT: I do, your Honor.

The COURT: What authority have you for that? It goes on to say they are entitled to get any information, not only

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to form the basis of the evidence itself but may lead to other witnesses or evidence. Someone who had written to give information, it might be of a nature they could use.

Mr. Britt: I still feel the public policy requires certain things of the government of the United States. We are in a little different position than the ordinary party to a lawsuit. We are in here enforcing a criminal statute on the civil side of the docket and in that connection we must rely to a large extent to find out any information from informants. If the policy of the country is going to be to disclose those people when the Attorney General feels it is unnecessary to do so and disclose their names, then the government is going to be stymied in the enforcement not only of the Anti-Trust Laws but all other laws.

The Court: It is not solely a civil action statute. The Act of Congress is not solely a civil action statute.

316 Mr. Britt: That is right. We come to a matter of public policy and if the Attorney General is going to be required to disclose every letter he receives from anybody about a case which he later decides to bring and make that man's name public he is going to find he is not going to get any more letters. If the Attorney-General—if in this case anyone who wrote a letter, we intend to call as a witness, we will disclose that. We have so stated in the answer to the Magnolia interrogatories. We have given them the names of anyone we will call as a witness and any statements we had, even statements taken orally by Mr. Memler have been included in some of the statements in the answer to the Magnolia interrogatories. I think the Attorney General certainly must have some sacredness of confidence within the government in order to perform his governmental function properly. He must have some little things to say about it and I think that is the least he can ask, that he be allowed to retain letters which have been written to him personally about a situation. It may be there were letters written about situations which did not give rise to a lawsuit, or some letters written that may refer to some of these things that have nothing to do with the facts of the case as they developed after the investigation and if we are going to be required to disclose all things of that nature, I think the enforcement of the law would be seriously endangered.

The Court: I will state this as my impression, thinking out loud as I often say, and not binding myself or either side with respect to it: Where the security of the country

might be involved in such matters, the court should protect the Attorney General or any other agency where that consequence is likely to happen. It is even my conception
317 that it is better for the security of the country to be protected even if the litigation has to fail. I don't intend to criticize Judge Reeves. I am sure he gave that study, and any expression I might make with respect to it would be an offhand opinion without any chance or opportunity to investigate. As I understand it, those things were captured in the woman's purse, in the Coplon case. In any event, in my conception, the right of the Attorney General or any other Department of the government is to respect the keeping of the security of the country, the protection of the public interest, and if it happens those would be seriously jeopardized by compelling the exposure of matters in the hands of the Attorney General or any other department of the government, it should not be done. That is the idea that runs in my mind.

On the other hand, where a civil lawsuit is involved and in the absence of some good reason to the contrary that the rules of civil procedure are just as binding to the government when it steps into the role of a litigant as to other parties. There is no distinction, barring security of the country or public welfare being injured. That is my impression of what the law is, or should be.

Mr. Britt: In the Coplon case, your Honor, I might point out to you the indictment charged this girl had taken parts of reports of the FBI so that the reports of the FBI in that case became a part of the *res gestae* of the crime which was charged.

The Court: I can appreciate that.

Mr. Britt: If the government would introduce only parts of those reports, under the old rule of law, she was entitled to have them all go in.

The Court: The government was not introducing
318 those reports. They were introducing what she had in her bag.

Mr. Britt: She had copied them from reports of the FBI. I was at part of the trial—

The Court: I don't think we are getting anywhere and it looks like the time has come for me to decide whether or not they should be produced.

Mr. Britt: I think my authority only goes this far; that is, to turn them over with the understanding that you compare them to see if the extractions are properly made and not with the idea of turning them over to the defendants.

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The COURT: I am not going to confine myself to such a rule as that.

My thought is I should examine them and determine whether in whole or in part they should be produced.

Mr. BRITT: I would like some time on that, your Honor, to give the Attorney General an opportunity to re-examine the situation in the light of your feeling on that. You will find his instructions to me are only to that extent, that only the extractions be submitted to the defendants and I am bound by his orders under a rule of Congress which enabled them to issue order No. 2239. I am in the same spot the fellow was in in Chicago where I have to respectfully decline and hope your Honor has a comfortable place for me to stay.

I want to repeat again with respect to these extractions I personally did it. I represent to the Court the only thing I omitted were procedural instructions of investiga-
319 tions and in a few instances opinions of an agent or in one case the agent attempted to analyze the utilization agreement and everybody has a copy of that.

The COURT: Do you know what that resolves itself into? You are becoming the Judge and ruling whether this stuff should be produced or not. Isn't that inescapable?

Mr. BRITT: No, not exactly, unless under the authority of the Attorney General—

The COURT: This is relegating to the Attorney General the responsibility of acting as Judge as to whether these things should be produced.

Mr. BRITT: I guess it does amount to that.

The COURT: I will give you time to see. I am not going to grab you by the nape of the neck and force you on that. My desire is to pass on it in accordance with what I believe to be the law.

Mr. BRITT: Am I to inform the Attorney General—

The COURT: My position is this: Before I would rule upon your motion to vacate the order heretofore entered I must see those documents and form my own judgment as to whether or not all or any part of them shall be produced during the trial.

Mr. BRITT: Very well. Your Honor, also in connection with this case, we have filed certain interrogatories and I believe all of the defendants, or most of them, have objected to them and have filed a motion to sustain their objections to the interrogatories. I have talked to Mr. Lafargue and he tells me two weeks in July have been set

aside for matters in his office but if the court were
320 willing he would be glad to have you set the argument on these motions down any time during those first two weeks and take up the time that has been allotted to him.

The COURT: It can be set down during that time, Mr. Britt. They are criminal matters and they are not that urgent.

Mr. BRITT: I would like to have it sometime after the 4th of July.

The COURT: If it is reasonably acceptable in that period of July. I indicated we will take what we call a vacation but we don't always do that.

Mr. BRITT: I particularly want it after the 1st of July. While they have raised our per diem allowance, it doesn't go into effect until after the 1st of July.

Gentlemen, can we agree on a date to argue this motion of interrogatories?

Mr. ARTHUR O'QUIN: If the Judge will fix a date we will be here.

The COURT: Give both sides a little time to think and you want to communicate with the Attorney General and both sides can discuss it and see if you can agree upon a date by tomorrow morning.

Mr. ARTHUR O'QUIN: I may call attention to the fact that one of the biggest objections the defendants have to the interrogatories is that the government is trying its case.

If your Honor please, there is one thing further in there I wish to call your Honor's attention to; that I was under the impression although somebody else tells me it is
321 different, all the time was made sixty days after the order of March 11th. Whether it was or not, they have not answered. That is more than three months and they haven't complied with the order. They have the order to strike but I have also filed a motion to fix a time in which they can comply with the motion to produce.

The COURT: If they filed their motion to vacate, that isn't within the time I allowed them to produce, I think it still holds the matter as to where the court can determine its action.

Mr. ARTHUR O'QUIN: My motion is that you fix a time after that date, they comply, and in default of compliance, the suit be dismissed under Rule 41.

The COURT: I don't think there is any question a time should be fixed.

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Mr. ARTHUR O'QUIN: We are not trying to put you in jail, Mr. Britt, for contempt. We want the suit dismissed.

The COURT: You folks see if you can get together on a date by tomorrow morning and you can get in touch with the Attorney General.

Mr. BRITT: Yes, sir.

Reporter's certificate to foregoing transcript omitted in printing.

323 Shreveport, Louisiana, June 16th, 1949, all parties being present in court the hearing was resumed as follows:

Colloquy

The COURT: All right, Mr. Britt, what is the verdict?

Mr. BRITT: Your Honor, I reported to Washington yesterday everything that transpired and I have to wait for a call back from there and they were unable to reach the Attorney General and come to any definite policy conclusion at that time and I particularly pointed out in indicating what your ruling would be this morning at Mr. O'Quin's suggestion that a date would be fixed within which I would be required to submit these documents to your Honor and with that in mind they thought it would be better to wait until I returned to Washington to decide whether then to comply with the order or leave your Honor take up other action.

The COURT: I am afraid there was a little misunderstanding, Mr. Britt. My thought was, I might not have put it over, that I would now make the examination and determine whether any part of the documents would be excluded and the time element, as I understood it, was when you would produce them for the benefit of counsel. That was the impression I had from what was said yesterday. I don't know what impression was received by the other side about that and whether Mr. O'Quin intended to have the time fixed by me in the determination of what would be allowed or whether it was the production in court.

Mr. ARTHUR O'QUIN: If your Honor please, as I understand your Honor's order, that you sustained the motion to produce but with the protective order it first be

324 submitted to your Honor to see if there is anything prejudicial to the public interest and, further, your Honor pass on any specific privilege they claim for any particular document.

Knowing your Honor, even though they didn't comply, you don't dismiss the case without giving them the oppor-

tunity they may have. Even though your Honor should overrule the motion to vacate, I ask there be a definite time in which to comply with your Honor's order. As soon as they present it to your Honor, as soon as the instruments are presented to your Honor, your Honor can see if there is anything prejudicial to the public interest and if not we immediately get those documents.

The COURT: That is rather voluminous, isn't it, Mr. Britt?

Mr. BRITT: Yes, sir.

The COURT: Here is what ran through my mind: The parts as to which you thought have the privileged claim or the reasons for not revealing the contents, you might with slips of paper mark what it is and not have me searching through and reading the whole thing. I don't want to do that.

Mr. BRITT: If you will merely examine the parts which I have said I do not think are properly within the meaning of the motion and skip the parts we are voluntarily submitting, it wouldn't be necessary for you to go through that, and that consists of one hundred and seventy-five typewritten pages. I don't see any reason why your Honor should go through that.

The COURT: I would think some indication why you claim it is privileged and should not be exposed should be delineated in the file and then when I pass upon it I can simply say "granted" or "denied" as the case may be. It seems to me that is the efficient way to handle it. I imagine with what you have already prepared here, it wouldn't take you a great deal of time to go through and do that.

You have not been able to contact the Attorney General, as I understand it?

Mr. BRITT: That is right.

The COURT: I don't think counsel has such disposition and I certainly don't want to deny the fullest opportunity to your department to consider the question of what you want to do about it. Of course, the alternative has been suggested here which would, in effect, stymie your suit. It might not dismiss it but it would prevent it from going on unless you complied.

Mr. BRITT: I understand that consequence.

The COURT: How much time do you want?

Mr. BRITT: I spoke to several counsel in connection with the arguments on the interrogatories and I suggested to them July 7th as the date for that argument. If your

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Honor thinks we ought to make this decision before that time—

The COURT: Don't you think you would have time enough to decide that by the 7th?

Mr. BRITT: Yes, I do.

The COURT: Suppose we give you until July 7th, or you can take the other alternative.

Mr. BRITT: Can that date be fixed so I can be pre-
326 pared to argue the interrogatories on that date?

The COURT: Yes.

Mr. Britt, I do recall Mr. Lafargue asked to have the first two weeks in July and this can be sandwiched in with his business for that two weeks. It hasn't been put on the calendar. The minute clerk tells me there is nothing beyond the 30th of June on the calendar so far. With that understanding with the other side, your move from there on is to get in touch with Mr. Lafargue and before he sets these other matters to leave this open for this case.

Mr. BRITT: I spoke to him yesterday and he told me he would be able to fix it with his calendar.

Mr. ARTHUR O'QUIN: May the record show the motion to vacate is overruled?

The COURT: Of course, Mr. O'Quin, that I am afraid would mean the entire order as heretofore entered, which was to produce on condition.

Mr. ARTHUR O'QUIN: With the protective condition, of course, your Honor would then pass upon it.

The COURT: The effect of the ruling is to deny the motion to vacate subject to the examination of the papers for the determination of whether any should be omitted because of security reasons. I think the record will show what happened.

Mr. ARTHUR O'QUIN: As to our motion to fix a definite time, the time is July 7th?

The COURT: Yes.

327 Mr. ARTHUR O'QUIN: We are prepared, if you don't meet the Court's order to argue the motion to dismiss, Mr. Britt.

The COURT: That is about the only means other than contempt that the Court has of enforcing its ruling.

(Reporter's Certificate to foregoing transcript omitted in printing.)

328 In the United States District Court

(Title Omitted)

Adoption of Motions of the Ohio Oil Company by Magnolia Petroleum Company—Filed June 15, 1949

To the Honorable Judge of Said Court:

Now comes Magnolia Petroleum Company, a defendant in the above-numbered and -entitled cause, and adopts as its own and urges as its own the motion to produce of The Ohio Oil Company, the motion of The Ohio Oil Company for order sustaining objections to interrogatories, and the objections of defendant The Ohio Oil Company to answering interrogatories filed by plaintiff, United States of America, as well as all other motions, allegations, and prayers heretofore filed or hereafterwards to be filed pertaining to said motion to produce or objections to interrogatories.

Wherefore, premises considered, defendant Magnolia Petroleum Company prays that, pending production of such instruments, it be not required to answer such interrogatories, that its objections to said interrogatories be sustained, that this cause be dismissed should plaintiff refuse to produce such instruments, and that at all events it have sixty (60) days from the entry of an order
329 herein within which to answer said interrogatories.

Dixon Carroll
Ricou-Brewster Bldg.
Shreveport 95, Louisiana

Chas. B. Wallace

Chas. B. Wallace
P. O. Box 900
2311 Magnolia Bldg.
Dallas 1, Texas
Attorneys for Defendant
Magnolia Petroleum Company

Of Counsel:
Wallace Hawkins
Earl A. Brown
P. O. Box 900
2311 Magnolia Bldg.
Dallas 1, Texas

(File Endorsement Omitted)

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330 In United States District Court

(Title Omitted)

Adoption of Motions of the Ohio Oil Company by Cotton Valley Operators Committee—Filed July 7, 1949

Defendant, COTTON VALLEY OPERATORS COMMITTEE, appearing under the compulsion of the Court's decision on the motion of J. J. Frommer to quash process and service of process, reserving all rights under, and reasserting all contentions made in the said motion respectfully adopts as its own and urges as its own the motion to produce of The Ohio Oil Company, the motion of The Ohio Oil Company for order sustaining objections to interrogatories, and the objections of defendant The Ohio Oil Company to
331 answering interrogatories filed by plaintiff, United States of America, as well as all other motions, allegations, and prayers heretofore filed or hereafterwards to be filed pertaining to said motion to produce or objections to interrogatories.

WHEREFORE, premises considered, defendant, Cotton Valley Operators Committee, prays that, pending production of such instruments, it be not required to answer such interrogatories, that its objections to said interrogatories be sustained, that this cause be dismissed should plaintiff refuse to produce such instruments, and that at all events it have sixty (60) days from the entry of an order herein within which to answer said interrogatories.

/s/ SIDNEY M. COOK
Sidney M. Cook
1500 Commercial Bank Building
Shreveport, Louisiana

/s/ CHARLES D. EGAN
Charles D. Egan
1500 Commercial Bank Building
Shreveport, Louisiana
Attorneys for Defendant, Cotton Valley Operators Committee

I certify that a copy of the foregoing motion has been served upon opposing counsel.

Shreveport, Louisiana, July 7, 1949.

/s/ CHARLES D. EGAN
Of Counsel

(File Endorsement Omitted)

332 In United States District Court
Western District of Louisiana
Shreveport Division

No. 2209 Civil Action

UNITED STATES OF AMERICA

vs.

COTTON VALLEY OPERATORS COMMITTEE, *et al.*

Transcript of Hearing—Filed July 13, 1949

Proceedings had in the above numbered and entitled cause, at Shreveport, Louisiana, beginning at 11:20 o'clock a. m., July 7th, 1949, before the Honorable Ben C. Dawkins, Judge of the United States District Court, Western District of Louisiana, relating to a motion to produce.

APPEARANCES:

Malcolm E. Lafargue, United States Attorney, Western District of Louisiana, and Daniel B. Britt, Special Assistant to the Attorney General, representing the plaintiff.

Charles B. Wallace, Magnolia Building, Dallas Texas, and Dixon Carroll, Ricou-Brewster Bldg., Shreveport, La., representing Magnolia Petroleum Company.

Arthur O'Quin, First National Bank Bldg., Shreveport, La., and C. Ford Currier, Shreveport, La., representing the Ohio Oil Company.

Charles T. Black and W. W. Heard, representing Stanolind Oil & Gas Company.

Sidney M. Cook and C. D. Egan, Commercial National Bank Bldg., Shreveport, La., representing Cotton Valley Operators Committee.

333 John Madison, Slattery Bldg., Shreveport, La., representing Union Producing Company, *et al.*

David Smitherman, Shreveport, La., representing North American, *et al.*

J. R. Goff, Arcadia, La., representing H. L. Hunt Oil Company, *et al.*

Ralph Halliburton, Slattery Bldg., Shreveport, La., representing Woodley, *et al.*

Robert T. Russ, United States Court Reporter, Western District of Louisiana.

PROCEEDINGS

The COURT: Gentlemen, I am sorry for this delay, but I had something else in the office before coming out here.

You may proceed, Mr. Britt.

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Mr. Britt: May it please the Court, since my last appearance before your Honor something has happened which gives me reason to believe you might consider changing your ruling on this matter, and which I believe should be brought to your Honor's attention.

I have here, which I now hand to you, copy of an opinion written by Judge Kirkpatrick in Philadelphia last week, which I just received Tuesday evening just before getting on the train to come down here, which relates to the exact problem which we have here now, growing out of almost exactly the same kind of case. The subject matter of the case is not exactly the same, but it does relate to interrogatories, the nature of which is not stated or referred to in that opinion, but in effect it says that, as I have been arguing to your Honor the last few trips that I have made here, in an Anti-Trust suit where injunctive relief is
334 sought, which involves the violation of a criminal statute, it takes on not only privileged treatment, under Rule 34 and 26 (d), but under certain provisions the question of dealing with public policy which the Attorney General has to take into consideration in dealing with letters, or other communications, written by customers of the defendant, and states that they should not be produced by the Attorney General, if he decides that they should not be produced.

I would like to read the opinion rather than attempt to give you the substance of it. It is about five pages long, and if your Honor prefers I would like to read it to your Honor at this time.

The Court: Mr. Britt, the Court cannot shoot from the hip on these motions based on some opinion of a District Judge located somewhere else in the United States, and accept it as conclusive. I could give it such weight as I thought it entitled to receive persuasively, but it could have no binding effect on me. If you had a case where the Supreme Court had settled the question, or some Appellate Court, it would be more persuasive. Of course I have read some District Court opinions that were far more logical than some opinions I have read handed down by the Supreme Court of the United States, but that isn't the point. The point is I am not bound by them.

Mr. Britt: I appreciate that, your Honor, but I submit that the reasoning in this case is so sound you might, upon reading it, be willing to follow it.

The COURT: Have you furnished copies to all of opposing counsel?

Mr. BRITT: Yes, sir, I have.

335 The COURT: All right.

Mr. BRITT: I say that the reasoning is very sound. I do not say the case is controlling on your Honor, because I know that it can have no greater effect on you than any other District Court opinion. However, I think the reasoning is so sound that you will be persuaded to follow it and make your own decision upon it.

I would either like to have you read it, or permit me to read it to you.

The COURT: I will not stop the hearing now long enough to read that long opinion in open court. I can read it at some other time.

Mr. BRITT: Well, if your Honor pleases, I have a reservation to go back on a train this evening at 5:00 o'clock, and I would like to get away if I could.

The COURT: Well, I always like to accommodate counsel who may be far away from home, and wants to get back home.

Mr. BRITT: I did not mean that I could not stay here until tomorrow morning if it is necessary, may it please the Court. I will be glad to.

The COURT: In these matters I am going to try to take my time and do the best I can to reach a correct conclusion. I might be able to see the matter differently, and come to a different conclusion after I read the opinion. That I cannot tell. I have heretofore ruled that you should submit to me the document that you are called upon to produce, and after examining them I figured I would deter-

336 mine whether they should be presented in court in this case. That has not been done. I imagine this decision is offered with the view of changing my conclusion as to whether they should even be produced before me?

Mr. BRITT: That is one of the purposes in the offering of the opinion, yes, sir.

The COURT: If you are through I will hear from the other side.

Has the other side had a chance to read the opinion?

Mr. O'QUIN: Yes, sir.

The COURT: Then I will hear from you, Mr. O'Quin.

Argument on Behalf of Ohio Oil Company

Mr. O'QUIN: If your Honor pleases, I say that this is one opinion, by one District Judge, passing upon a matter that your Honor has already passed upon three times.

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Furthermore, a great majority—I will say nearly all—of the opinions on this matter are contrary to what was held in this case. Your Honor has had under consideration, and has considered three times, these other opinions on this point, and has ruled on this matter three times, and I do not think that this one opinion by one judge, with equal jurisdiction, or power, with your Honor, in the light of what your Honor has already ruled, and in the light of the consideration your Honor has already given to it, should be given any consideration now.

In addition to that, before passing on our motion to produce under Rule 34, your Honor has entered a protective order setting forth that this information is to be furnished to your Honor, and not to us, in order for your Honor to read it and determine whether or not it is privileged.

337 If after reviewing it your Honor determines that you have been incorrect, then we cannot get it.

In the case which Mr. Britt has handed to your Honor the judge there he had the choice of saying yes or no; that they would either produce them, or not produce them. In this case your Honor has the right under your previous ruling to view these documents and see whether they are privileged, or whether it would be against public interest to divulge them, before we are even given an opportunity to see them. You will protect the public interest yourself.

Mr. Britt: If you Honor pleases, may I say just one word in answer to that?

The Court: Yes.

Mr. Britt: I think that Mr. O'Quin's statement that a majority of the opinions in this type of cases are contrary to this one is not exactly correct, because this is a civil case under the Anti-Trust Laws seeking injunction, just as we have here, and the other cases, such as contempt cases, were cases between two private individuals who were suing each other, and attempting to get the Government to produce records. Then in the Hickman case the purported reports were part of the charge, and in the indictment, and when Judge Reeves ordered them produced the Attorney General decided to go ahead with the case. It was because they were a part of the *Res Gestae* of the case.

Here you will see, by reading the opinion, I think, that it is on all-fours with the situation we have, almost identical with the situation we have here. Your Honor will

338 see, by reading that opinion, that we do not have to produce the reports or letters of the customers them-

selves even to the Court, and I think, if your Honor will study this opinion, it will persuade you to the effect that we do not have to produce these documents even to your Honor.

I have offered them every document that was obtained by the FBI. I have offered them my excerpts of the report, which I believe is the best way to handle it, because while I am not willing to give them the official reports themselves, because they contain matters that are between ourselves in our own little family down there in Washington, but I have given them every record I have, and have offered to give them every record that might be in my possession, with the names of all of the witnesses we have contacted, anybody and everybody, and I still make that offer, and in addition to that I offer to your Honor official excerpts of my office records I have made to let your Honor determine whether I have done a good job or not.

Since I was here before I have gone into these record very thoroughly, and I have made a summary and analysis covering parts and portions of the record that I made from the originals themselves, and I think that is the practical manner to handle it, and you will be able to go through it much faster because I refer to it by paragraph and page, and discuss it in my analysis. These exhibits you can read, and they will assist you in determining whether or not the defendant should be entitled to the official records themselves. I offer that to the Court, but I cannot, and I have not been authorized by the Attorney General, but, on the contrary, have been ordered by him to refuse to surrender the
339 official reports themselves, even though, I frankly state to your Honor, I have them in my possession here.

The COURT: Well, the situation is that I am confronted with the problem of determining whether I shall order these records produced and given to the defendant, or whether the Attorney General shall decide the matter. That is what I am confronted with.

Mr. BRITT: That is it exactly.

The COURT: I suggest then that we take a recess and I will read this opinion and see what it contains.

We will take a recess and come back at one-thirty, at which time I will determine the matter.

Mr. BRITT: That exhibit your Honor sees there was not attached to the original opinion. I made a copy of it and attached it so that your Honor could understand what Judge Kirkpatrick was talking about.

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The COURT: All right. We will recess until one-thirty.

(Whereupon at 12:00 o'clock Noon a recess was taken in the hearing of this matter to 1:30 o'clock p. m.)

AFTERNOON SESSION

Ruling of Court

The COURT: Gentlemen, I have considered this opinion of Judge Kirkpatrick, and that examination has not served to change my views as to what should be done to determine whether or not the documents called for in the motion to produce are privileged within the meaning of the Rules of Civil Procedure.

In that case the method used for discovery was the pro-
pounding of interrogatories, in which the choice was
340 to either produce or decline. Here the Court has
heard the parties on the motion to produce and conclude that the only way in which it can determine the question of privilege is by inspecting the document itself before production in court, and has, accordingly, directed that counsel for the Government list and indicate by proper means in the files those documents claimed to be privileged. Counsel for the Government states that each of the files does not fall within that category, and has agreed to furnish some of it. To say that this ends the matter is to state that counsel for plaintiff, or the Government, is the exclusive judge of whether the documents are privileged.

This is a Civil Lawsuit, and the pleadings disclose that the nature of the subject matter is primarily an oil field, refinery operations in connection therewith, whereas the case which Judge Kirkpatrick handled the operations of the defendant are stated to have been nation wide, and in many instances there may have been information and documents which fell within the category of privilege where no step has been taken to safeguard against it, and wherein it could be handled only by permitting or denying the interrogatories.

I am not convinced that the matter of privilege should be left exclusively to the Attorney General, but I believe it is my duty to determine this question by an examination of the documents.

Mr. BRITT: May it please the Court, as I indicated this morning, I have been ordered to come before your Honor and say that I have the reports with me, but it is my instruction to respectfully decline to produce them to your Honor under these circumstances.

The Court: Mr. Britt, the only alternative then,
341 as I appreciate it, is to direct you to do that within a fixed time, and if it is not done within that fixed time to dismiss the suit.

Mr. Britt: Well, that is the way it is, your Honor.

The Court: I see no other course to take except to follow this course as a legal solution to the matter, so you will be given a certain length of time, after which if you fail to produce the case will have to be dismissed.

Of course, you would have the right then to go to the Appellate Court.

Mr. Britt: I think that would be a very good course to follow, your Honor.

The Court: Then I will give you 10 days in which to submit these documents to the Court, and if not done within that time then this suit will be dismissed.

Mr. Britt: I am perfectly willing for the time to start now, if your Honor pleases. I have them here, and I still refuse to produce them.

The Court: All right, let the suit be dismissed at this time.

Mr. O'Quin: If your Honor pleases, do you desire a decree written up on that?

The Court: Mr. O'Quin, I think it should be in the form of a judgment, stating the grounds on which it is dismissed in the judgment itself.

Mr. Britt: Mr. O'Quin and I can agree on that,
342 I think.

Mr. O'Quin: Yes.

Reporter's Certificate to foregoing transcript omitted in printing.

(File Endorsement Omitted)

343 In the United States District Court for the Western District of Louisiana

Shreveport Division Civil Action No. 2209

United States of America

vs.

Cotton Valley Operators Committee, The Ohio Oil Company, *et al.*

Judgment and Order—Filed Sept. 20, 1949.

On November 7, 1947, the Ohio Oil Company, one of the defendants in this case, filed a motion to require plaintiff to produce for inspection, certain documents, including re-

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ports of the Federal Bureau of Investigation, correspondence, etc., with various persons, all as stated in said motion, which is made part hereof. Similar motions were filed by the other defendants. The Court, having recalled and quashed certain subpoenas *duces tecum*, obtained *ex parte* by the Magnolia Petroleum Company, another defendant, for reasons stated in the written opinion on January 2, 1948, its attention was called to the fact that it had not passed upon the said motion of The Ohio Oil Company. Being of the impression that the latter was, in all material respects, similar to the motion to produce and subpoenas *duces tecum* previously disposed of on said January 2, 1948, the said motion of the Ohio Oil Company, was, on April 21, 1948, denied in a memorandum opinion filed April 22, and as appears from a written order to that effect filed June 1, 1948.

Counsel for other defendants had filed similar motions to produce and, at the several hearings, appeared and joined in the contentions of The Ohio Oil Company.

Thereafter, on August 26, 1948, the said The Ohio Oil Company filed a motion to vacate the said order of April 21, 1948, which had denied its motion to produce and this was argued and submitted on September 17, 1948. Subsequently, the matter was, on February 21, 1949, reset
344 for hearing on March 11, 1949, at which time, having heard further arguments, it was ordered that the Government produce the documents requested by The Ohio Oil Company "with the right to submit to the Court for ruling any documents they desired to claim to be privileged."

On May 10, 1949, plaintiff filed a motion to vacate said order of March 11, 1949, and on June 15, following, it was heard and defendants declined to accept the Government's offer of partial compliance by filing an abstract of factual information contained in the reports of the Federal Bureau of Investigation, and the Court indicated its purpose to adhere to the ruling requiring the Government to produce the documents. At this time counsel for the Government requested time to contact the Attorney General, before the Court finally ruled on the said motion to vacate, which was granted, and on the following day, June 16, 1949, when the hearing was resumed and the Court denied the said motion to vacate, counsel for the Government was given additional time to consult with the Attorney General as to whether the Court's order to produce would be complied with, and the

question of what was to be done in case of refusal was reset for July 7, 1949.

On the last mentioned date, counsel for the Government appeared and submitted further authorities as to the right of the Attorney General to claim and for himself determine the question of privilege as to the documents called for in the motions to produce. Thereupon, after considering said cases, the Court stated from the Bench that to sustain this contention, would in effect, amount to an abdication of the Court's duty to decide the matter and leave it entirely in the hands of the Attorney General; that if the documents were submitted to the Court, with such claims as to privilege as the Attorney General desired to make, they would be considered and if it appeared, in the Court's judgment, that production of any part thereof would be injurious to public interest, they would be excluded; otherwise,
345 the order to produce for the inspection of defendants would be sustained. This, having been declined, counsel was told that a reasonable time would be allowed for further consideration, and the latter, stating no additional time was desired, the Court announced that the only course left was to dismiss the complaint for failure to comply with its orders. All the motions by both sides, above enumerated, and the minutes of the Court, and notes of the court reporter are made part hereof.

IT IS THEREFORE ORDERED, ADJUGDED AND DECREED THAT this cause be dismissed for the failure of plaintiff to comply with the Court's order to produce for its inspection the documents called for in the motions, so it could determine the question of privilege under the law.

Done and signed on this September 19th, 1949.

s/ BEN C. DAWKINS
U. S. District Judge

(File Endorsement Omitted)

346 In United States District Court

(Title Omitted)

Petition for Appeal—Filed Nov. 16, 1949

The United States of America, plaintiff in the above-entitled cause, considering itself aggrieved by the final judgment of this Court entered on the twentieth day of September, 1949, does hereby pray an appeal from said final judgment to the Supreme Court of the United States.

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Pursuant to Rule 12 of the Rules of the Supreme Court plaintiff presents to this Court herewith a statement showing the basis of jurisdiction of the Supreme Court to entertain an appeal in this cause.

The particulars wherein the plaintiff considers the judgment erroneous are set forth in the assignment of errors and prayer for reversal accompanying this petition and to which reference is hereby made.

Plaintiff prays that this appeal may be allowed and that citation be issued as provided by law, and that a transcript of the record, proceedings, and documents upon which said final judgment was based, duly authenticated, be sent to the Supreme Court of the United States under the rules of said Court in such cases made and provided.

s) DANIEL B. BRITT
Daniel B. Britt
Special Assistant to the Attorney General

s) WILLARD R. MEMLER
Willard R. Memler
Special Attorney

s) MALCOLM E. LAFARGUE
Malcolm E. Lafargue
United States Attorney

Dated this 14 day of November, 1949.

(File Endorsement Omitted)

347 In United States District Court

(Title Omitted)

Order Allowing Appeal—Filed Nov. 16, 1949

In the above-entitled cause the United States of America, plaintiff, having made and filed its petition praying an appeal to the Supreme Court of the United States from the final Judgment of this Court in this cause entered on the twentieth day of September 1949, and having also made and filed its petition for appeal, assignment of errors and prayer for reversal, and statement of jurisdiction, and having in all respects conformed to the statutes and rules in such cases made and provided,

IT IS THEREFORE ORDERED AND ADJUDGED

That the appeal be and the same is hereby allowed as prayed for.

BEN C. DAWKINS
United States District Judge

Dated this 16 day of November, 1949.

(File Endorsement Omitted)

348 In the District Court of the United States
For the Western District of Louisiana
Shreveport Division

Citation in usual form, filed Nov. 16, 1949, omitted in printing.

349 In United States District Court

(Title Omitted)

Assignment of Errors and Prayer for Reversal—Filed Nov. 16, 1949

The United States of America, plaintiff in the above-entitled cause, in connection with its petition for appeal to the Supreme Court of the United States, hereby assigns error to the record and proceedings and the entry of the final decree in the district court on September 20, 1949, in the above-entitled cause, and says that in the entry of the final decree the district court committed error to the prejudice of the plaintiff in the following particulars:

1. The court erred in dismissing the complaint for the failure of plaintiff to produce for inspection reports of the Federal Bureau of Investigation during the period from February 1, 1946 to June 17, 1947 and all correspondence of the Department of Justice during the period from August 1, 1945 to June 17, 1947, relating to the subject matter of this action.

2. The court erred in granting defendants' motion for the production of the aforesaid documents, as more particularly set forth in said motion, notwithstanding the affidavits of the Attorney General that these documents are privileged and confidenial in the public interest.

3. The court erred in granting defendants' motion for the production of all reports made by agents of the Federal Bureau of Investigation to the Attorney General or
350 to the Department of Justice during the period from February 1, 1946 to the date of institution of this

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action, relating to the subject matter of this action, as more particularly set forth in said motion, notwithstanding the Attorney General's assertion that these documents are privileged and confidential in the public interest.

4. The court erred in granting defendants' motion for the production of all letters, telegrams, and other communications, with copies of replies thereto, received by the Department of Justice from August 1, 1945 to the date of institution of this action, from private individuals, corporations or associations relating to methods of operations conducted by defendants, alone or in association with other defendants in connection with the production, processing and manufacturing of liquid and gaseous hydrocarbons produced from the Cotton Valley Field, nothwithstanding the Attorney General's assertion that these documents are privileged and confidential in the public interest.

5. The court erred in granting defendants' motion for the production of aforesaid documents, as more particularly set forth in said motion, in that it encroached upon the executive's authority under the Constitution and violated Section 161 of the Revised Statutes as implemented by the Attorney General's order of May 2, 1939 made pursuant thereto.

6. The court erred in granting defendants' motion for the production of aforesaid documents in that they were not designated, nor was good cause shown, as required by Rule 34, Federal Rules of Civil Procedure.

351 WHEREFORE, plaintiff prays that the final decree of the district court may be reversed to the extent that it is inconsistent with the errors herein assigned by the plaintiff, and for such other and fit relief as the court may deem just and proper.

s) DANIEL B. BRITT
Daniel B. Britt
Special Assistant to the Attorney General

s) WILLARD R. MEMLER
Willard R. Memler
Special Attorney

s) MALCOLM E. LAFARGUE
Malcolm E. Lafargue
United States Attorney

Dated this 14 day of November, 1949.

(File Endorsement Omitted)

354 In United States District Court

(Title Omitted)

Praecipe for Transcript of Record—Filed November 16, 1949

To: The Clerk of the United States District Court for the Western District of Louisiana, Shreveport Division

The appellant hereby directs that in preparing the transcript of the record in the above-entitled cause for its appeal to the Supreme Court of the United States, you include the following:

1. Complaint filed (June 17, 1947).
2. Order that any and all defendants may join in any preliminary plea or motion (July 30, 1947).
3. Answer of Woodley Petroleum Co. (title only) (October 1, 1947).
4. Notice of intention to take oral depositions by Magnolia Petroleum Co. (October 11, 1947).
5. Civil subpoena *duces tecum* directed to Tom C. Clark, Malcolm E. Lafargue, *et al.* (October 11, 1947).
6. Motion to strike or limit defendant Magnolia Petroleum Company's notice of intention to take oral depositions. Exhibits "A" to "G" inclusive, together with notice of motion (October 22, 1947).
7. Reply of Magnolia Petroleum Company to motion to strike or limit their intention to take oral depositions (October 24, 1947).
8. Motion for production of documents with affidavit of J. P. D'Artois filed by the Ohio Oil Company (October 25, 1947).
9. Joint reply of Magnolia Petroleum Company to all motions to strike, motion to vacate or limit defendant Magnolia Petroleum Company's notice of intention to take oral depositions (November 4, 1947).

355 10. More definite statement filed by plaintiff as to certain of defendant's requests (November 21, 1947).

11. Opinion of Judge Dawkins filed: ". . . the subpoena *duces tecum* should be recalled and quashed . . ." (January 21, 1948).
12. Order granting Government's motion to strike defendants' application to take oral depositions (January 21, 1948).
13. Opinion of Judge Dawkins (March 15, 1948).
14. Opinion of Judge Dawkins denying motion of Ohio Oil Company to produce certain documents, etc. (April 22, 1948).

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15. Order denying motion of Ohio Oil Company for an order requiring plaintiff to produce documents and also denying defendant Magnolia Petroleum Company's notice of intention to take oral depositions and the subpoena *duces tecum* issued pursuant thereto but vacated (June 1, 1948).
16. Plaintiff's second more definte statement (June 10, 1948).
17. Answer of Magnolia Petroleum Co. (title only) (August 9, 1948).
18. Answer of Hunt Oil Co., Roy Lee, trustee of Hassie Hunt Trust and H. L. Hunt (title only) (August 13, 1948).
19. Answer of Stanolind Gas Co. (title only) (August 13, 1948).
20. Answer of Fohs Oil Co. (title only) (August 13, 1948).
21. Motion to produce under Rule 34 (August 24, 1948).
22. Motion to vacate and set aside order of April 21, 1948 denying Ohio Oil's motion for production of documents. (Opinion filed April 22, Order, June 1) (August 26, 1948).
23. Motion for production of documents under Rule 34 filed by defendant Magnolia Petroleum Co. (September 9, 1948).
24. List of documents required in affidavit attached to motion for production of documents filed September 9, 1948 by Magnolia. Motion granted on same date and complied with. See Transcript of Oral Argument, page 2. (September 17, 1948.)

356 25. Interrogatories of defendant Magnolia Petroleum Company under Rule 33 (January 19, 1949).

26. Motion and objections to interrogatories filed by plaintiff (February 14, 1949).
27. Entire transcript of hearing held on Government's objections to interrogatories filed under Rule 33 by defendant Magnolia Petroleum Company and other motions, heard on March 11, 1949.
28. Court order sustaining motion of Ohio Oil Company for production under Rule 34 of Federal Bureau of Investigation Reports; any documents claimed by the Attorney General as privileged should be presented to the court for its decision concerning such privilege. See Transcript of Testimony on that date, pages 84, 85, and 86. (March 11, 1949.)
29. Defendants' answer to plaintiff's second more definite statement (title only) (April , 1949).

30. Answer of defendant North American Oil Consolidated (title only) (April 7, 1949).
31. Answer of defendant G. H. Vaughn (title only) (April 11, 1949).
32. Defendants' answer to plaintiff's complaint (title only) (Supply any answers filed on that date, title only) (April 12, 1949).
33. Defendants' answer of Sidney S. Myers, Mrs. Nellie G. Myers, Welori Lumber Corporation (title only) (May , 1949).
34. Plaintiff's answer to interrogatories propounded by defendant Magnolia Petroleum Company (May 9, 1949).
35. Plaintiff's motion to vacate order of March 11, 1949 directing the plaintiff to produce reports made by agents of the Federal Bureau of Investigation, and notice of motion, with Affidavit of the Attorney General in support of Government's motion (May 10, 1949).

357 36. Answers of defendants Union Producing Co., W. A. Delaney, Jr., Sun Ray Oil Corp., A. G. Oliphant, Allene Oliphant, Charles W. Oliphant, H. W. Perritt, E. V. Whitwell (titles only) (May 11, 1949).

37. Answer of Cotton Valley Operators Committee (title only) (June 9, 1949).
38. Hearing on Government's motion to vacate order of March 11, 1949 (June 15-16, 1949).
39. Defendant Magnolia Petroleum Company's request for adoption of motions of Ohio Oil Company (June , 1949).
40. Adoption of motion of Ohio Oil Company by Cotton Valley Operators Committee (July 7, 1949).
41. Court ruling dismissing case on basis of Government's refusal to produce Federal Bureau of Investigation reports and the Attorney General's correspondence as sought by defendants' motion under Rule 34, Federal Rules of Civil Procedure, which was granted (July 7, 1949).
42. Transcript of Testimony on July 7, 1949 (July 13, 1949).
43. Judgment and order dismissing action for failure of plaintiff to comply with court's order to produce for its inspection the documents called for in the motions (September 20, 1949).
44. Petition for Appeal.
45. Assignments of Error.
46. Statement as to Jurisdiction.

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47. Order Allowing Appeal.
48. Citation to Appellees.
49. Notice to Appellees under Rule 12 of the Rules of the Supreme Court.
358 50. Proof of Service on Appellees.
51. Praecipe for Transcript of Record.

s) Daniel B. Britt
Daniel B. Britt
Special Assistant to the Attorney General

s) Willard R. Memler
Willard R. Memler
Special Attorney

s) Malcolm E. Lafargue
Malcolm E. Lafargue
United States Attorney

(File Endorsement Omitted)

359 In United States District Court

(Title Omitted)

(File Endorsement Omitted)

Designation of Additional Portions of the Record to be Included in the Transcript--Filed Nov. 22, 1949

To: The Clerk of the United States District Court for the Western District of Louisiana, Shreveport Division

Appellee Magnolia Petroleum Company hereby directs that in preparing the transcript of the record in the above-numbered and -entitled cause for the appeal by the United States of America to the Supreme Court of the United States, in addition to the portions of the record designated by appellant, the United States of America, you include the following:

1. Answer of Magnolia Peroleum Company copied verbatim, which answer was filed on August 9, 1948, and which verbatim copy will be in addition to item 17 designated by the United States but which designation called for inclusion of the title only of such answer.
2. This designation of additional portions of the record.

Dixon Carroll
Dixon Carroll
Ricou-Brewster Building
Shreveport, Louisiana

WALACE HAWKINS
EARL A. BROWN
CHAS. B. WALLACE
Chas. B. Wallace
2311 Magnolia Building
P. O. Box 900
Dallas, Texas
Tel. C-4131, Sta. 248, L. D. 246
Attorneys for Defendant and Appellee Magnolia Petroleum Company

360 I hereby certify that copies of the foregoing designation of addition portions of the record have been served upon plaintiff through Honorable Malcolm E. Lafargue, United States Attorney, Honorable Daniel B. Britt, Special Assistant to the Attorney General, and to Honorable Willard R. Memler, Special Attorney, the attorneys of record for plaintiff, and to the attorneys of record for each of the other defendants, by mailing a copy of the same, postage prepaid and properly addressed, to such attorneys on the 21st day of November, 1949; and I further certify that a copy of such additional designation was mailed to the clerk of the above court in Shreveport, Caddo Parish, Louisiana, on November 21, 1949.

CHAS. B. WALLACE
Attorney for Defendant and Appellee Magnolia Petroleum Company

361 In United States District Court

(Title Omitted)

Answer of Defendant Magnolia Petroleum Company—Filed August 9, 1948

Now comes defendant MAGNOLIA PETROLEUM COMPANY, subject to its motion to strike, without waiving the same but still insisting thereon, and files this as its answer in the above-entitled and-numbered action, in answer to plaintiff's complaint, as amended by Plaintiff's More Definite Statement and by Plaintiff's Second More Definite Statement, and says:

FIRST DEFENSE

Plaintiff's complaint, as amended, fails to state a claim upon which relief can be granted.

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Second Defense

This defendant denies all of the allegations of paragraphs 1 and 2 of part I of the complaint, whether set forth as allegations of fact or conclusions of law, in so far as plaintiff therein alleges or charges that this defendant has violated provisions of the Act of Congress of July 2, 1890, Chapter 647, 26 Stat. 209, as amended, entitled "An Act to protect trade and commerce against unlawful restraints and monopolies," commonly known as the "Sherman Act."

Third Defense

This defendant denies the allegation made in paragraph 6 of part II of the complaint that all of the persons and corporations listed in paragraphs 4 and 5 of part II of the complaint are members of the "operators' com-
362 mittee"; and as to the remainder of the allegations of said paragraph 6 this defendant is without knowledge or information sufficient to form a belief as to the truth of such averments.

Fourth Defense

In connection with the allegations of paragraph 9 of part III of the complaint, this defendant shows that in 1939 Ohio Oil Company in connection with other defendants conducted certain experiments for the purpose of determining whether or not liquid hydrocarbons could be separated from the "natural flow" of wells in the Cotton Valley Field which were producing from horizons below the base of the Travis Peak formation, and the residue gas returned to the reservoir with a resulting conservation of liquid hydrocarbons and gas, and maintenance of pressure in the reservoir from which such hydrocarbons were produced; that by such experiments it was determined that liquid hydrocarbons could be recovered from the "natural flow" of such wells and the residue gas returned to the reservoir with a resulting maintenance of pressure in the reservoir, all contributing to and promoting the conservation of liquid hydrocarbons and gas in conformity with the public policy of the State of Louisiana as declared in the Constitution and statutes of said state; and that it was further determined by experiment that by further processing or fractionating the liquid hydrocarbons recoverable from the "natural flow" of such wells, said liquid hydrocarbons could be reduced to stabilized, merchantable or marketable liquids, suitable for transportation and in pub-

lic demand, and that such processing and fractionating would be in accord with said public policy of the State of Louisiana in that the same would further contribute to the avoidance of physical waste of said liquid hydrocarbons.

Further replying to the allegations of said paragraph 9, this defendant states that in 1940 it, together with other operators in the field, entered into an agreement known as the "Cotton Valley Unitization and Pressure Maintenance Agreement" for the declared purpose of "more properly conserving the resources of said common oil, gas and other hydrocarbon field, pool or reservoir, and for the prevention of underground and surface waste." Said agreement declared that it was in the public interest that a unit plan of development and operation be adopted "to promote economical and efficient management, the maximum conservation and recovery of oil, gas and other hydrocarbons that may be produced from said Cotton Valley Field without waste, and a fair apportionment of the benefits involved among the parties entitled thereto." It was provided in said agreement that the owners of the right, in whole or in part, to search for and produce oil, gas and other hydrocarbons within the Cotton Valley Field had considered plans for "the installation of a recycling, pressure maintenance and liquid hydrocarbon extraction and processing plant for the return to the reservoir or recycling of some or all of the gas which may be produced from the participating areas," which included certain parts of the field and certain gas-producing horizons below the base of the Travis Peak formation, and a committee of such persons, appointed in said agreement, was directed "to continue consideration of such plans and to work toward the completion of same, and, as soon as practicable, to arrange for the construction of a modern recycling, pressure maintenance and liquid hydrocarbon extraction and processing plant, designed, constructed and maintained so as to comply with the best accepted engineering practices, adapted to the most efficient, practical and economic operation, and the installation therein of all equipment necessary to the greatest practical, economic and efficient recovery and saving, and the conversion into marketable produce of the liquid and liquefiable hydrocarbons from the gas and liquid hydrocarbons put through such plant."

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In entering into said Cotton Valley Unitization and Pressure Maintenance Agreement, and in prosecuting the plan therein provided, this defendant acted in the belief

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that such agreement and plan, and the performance of such agreement and execution of said plan, were necessary to the prevention of physical waste of liquid hydrocarbons and natural gas and that in the practical operation of the field it as both sanctioned and required by the conservation laws of the State of Louisiana; and it now alleges that said agreement and plan and the carrying out of the same, under the facts involved, were required by the laws of Louisiana prohibiting the waste of oil and gas. The acts of this defendant under said agreement have been in accord with said agreement and the approval thereof by the Department of Conservation of the State of Louisiana, next hereinafter alleged.

Said Cotton Valley Unitization and Pressure Maintenance Agreement was submitted to the Department of Conservation of the State of Louisiana, and the Commissioner of Conservation, pursuant to the provisions of Act No. 225 of 1936 and of Act No. 157 of 1940, by order No. 10-B, dated July 1, 1940, and order No. 10-C, dated January 28, 1941, approved said Cotton Valley Unitization and Pressure Maintenance Agreement and provided special rules and regulations relating to the production of oil and gas, the recycling of gas, the unitization of ownerships and the allocation and distribution of oil and gas productions from said field under the terms of said agreement; and, in virtue of said agreement and said approval thereof by the Commissioner of Conservation of the State of Louisiana, the ownership by the parties to
365 said agreement of hydrocarbons in the lands and formations included in said agreement became a joint ownership between them, their respective proportions of said ownership being as shown in said agreement; and thereafter the production of gas and the extraction of liquid hydrocarbons therefrom and the processing of said liquid hydrocarbons were required by the laws of the State of Louisiana and the lawful orders of the Department of Conservation of the State of Louisiana.

Incidental to the common ownership among the parties to said agreement of the gas and liquid hydrocarbons produced from the field and producing horizons involved in said Cotton Valley Unitization and Pressure Maintenance Agreement was, and is, the right to jointly process their said common property and jointly market the same, such property right being one held under and imposed by the laws of the State of Louisiana as a result of the unitization features of said agreement which were necessary in order

to comply with the laws and public policy of the state requiring the conservation of natural resources of the state.

All allegations of paragraph 9 of Part III of the complaint which are or may be in conflict with the allegations of this paragraph of this answer are denied.

FIFTH DEFENSE

This defendant admits the allegations of paragraphs 10 of part III of the complaint in so far as they allege a delegation of power to the Commissioner of Conservation of the State of Louisiana by the Acts of 1936 and 1940 therein described and the issuance by said Commissioner of Order No. 10-B, dated July 1, 1940, and Order No. 10-C, dated January 28, 1941, approving the Cotton Valley Unitization and Pressure Maintenance Agreement, but this defendant denies the allegations of said paragraph 10 of part III of the complaint in so far as plaintiff there asserts
366 that approval of such agreement "was only in so far as it provided for the unit operation and development of the area covered by the Agreement and the reinjection into the reservoir under pressure of a part of the liquid and gaseous hydrocarbons produced from said field," and in connection with its denial of said allegations of the complaint, this defendant alleges that the approval was of the entire plan set forth in said agreement, including the plan for the processing of said liquid hydrocarbons.

SIXTH DEFENSE

In connection with the allegations of paragraph 11 of part IV of the complaint, this defendant shows that the nature of the liquid hydrocarbons, known as raw condensate or raw distillate, first extracted or separated (at the plant referred to herein) in the course of production from the Cotton Valley Field, is such that said liquid hydrocarbons cannot be marketed or otherwise handled (without tremendous physical waste, prohibited by the laws of Louisiana) in the absence of further separation or processing for the purpose of producing or recovering the marketable products thereof, and that no portion of such liquid hydrocarbons has ever been or could have been shipped to consumers in states other than Louisiana without processing as that term is defined in the More Definite Statement furnished by plaintiff in connection with said paragraph 11; that all liquid hydrocarbons allocated to this defendant in accordance with the provisions of the Cotton Valley Unitization and Pressure Maintenance Agreement (ex-

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cept toluene sold to the United States during the pendency of World War II) have been sold upon the open market as produced and allocated at prices then and there available and this defendant is consequently without information with regard to the ultimate consumption or use thereof; and as to the remaining allegations set forth in paragraph 11 of part V of the complaint, this defendant says that it is without knowledge or information sufficient to form a belief as to the truth of such averments.

367 SEVENTH DEFENSE

This defendant denies the allegations set forth in paragraph 12 of part V of the complaint.

EIGHTH DEFENSE

This defendant denies all of the allegations set forth in paragraph 13 of part V of the complaint, both as said paragraph was originally written and as it was amended or enlarged by paragraph 5 of the More Definite Statement filed by plaintiff.

NINTH DEFENSE

This defendant denies the allegations of paragraph 14 of part V of the complaint.

TENTH DEFENSE

This defendant denies the allegations of paragraph 16 of part V of the complaint, both as originally written and as amended or enlarged by paragraphs 6, 7 and 8 of the More Definite Statement filed by plaintiff.

ELEVENTH DEFENSE

This defendant denies the allegations of paragraphs 3 of the More Definite Statement filed by plaintiff.

TWELFTH DEFENSE

This defendant denies the allegations of paragraph 4 of the More Definite Statement filed by plaintiff.

THIRTEENTH DEFENSE

This defendant denies the allegations of the second unnumbered paragraph of paragraph A of part I of Plaintiff's Second More Definite Statement in so far as it is therein alleged that this defendant completed the joint construction of a permanent recycling plant in the month of May, 1941, and placed it in operation; and in connection with this denial it alleges that the plant contemplated by the Cotton Valley Unitization and Pressure Maintenance

Agreement and proposed therein was not completed until there had been installed the processing equipment
368 now operated for the extraction of liquid hydrocarbons and processing thereof.

FOURTEENTH DEFENSE

This defendant admits the allegations of the third unnumbered paragraph of paragraph A of part I of Plaintiff's Second More Definite Statement except the implication therein that a part of the operations of this defendant is in violation of the Sherman Act; and, in this connection with such denial, it denies each and every allegation made in plaintiff's pleadings charging that this defendant has agreed, combined and conspired to do or perform acts in violation of said Sherman Act.

FIFTEENTH DEFENSE

This defendant admits the allegation of the fourth unnumbered paragraph of paragraph A of part I of Plaintiff's Second More Definite Statement to the effect that it has jointly extracted and processed separate hydrocarbons and the allegation of said paragraph to the effect that the joint separation by defendant of liquid gaseous hydrocarbons is not in violation of the Sherman Act; but this defendant expressly denies all other allegations made in said paragraph and in the subparagraphs thereof numbered 1, 2 and 3.

SIXTEENTH DEFENSE

This defendant denies all allegations of paragraph B of part I of Plaintiff's Second More Definite Statement except the allegation that the distribution and sale of gas by this defendant were not in violation of the Sherman Act.

SEVENTEENTH DEFENSE

This defendant denies all allegations of each and every paragraph of part II of Plaintiff's second More Definite Statement in so far as plaintiff therein alleges that the acts of this defendant constituted violations of the Sherman Act; and as to the remainder of the allegations
369 of part II of plaintiff's Second More Definite Statement, this defendant says that it is without sufficient knowledge or information to form a belief as to the truth of any such averments.

EIGHTEENTH DEFENSE

This defendant denies that it has formed any agreement, combination or conspiracy to fix prices, or terms or condi-

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tions of sale, of any product of the Cotton Valley Field, or to exclude any other person, firm or corporation from the business of extracting, processing or refining the products of the Cotton Valley Field; or that it has agreed, conspired or combined to jointly sell at uniform prices, or otherwise, the liquid hydrocarbon products of said Cotton Valley Field; or that it has agreed, conspired or combined to monopolize the transportation of the products of said field or to exclude others from engaging in the business of transporting said products; or that it has agreed, combined or conspired to refuse to sell to any person the products of said field.

Nineteenth Defense

For a further and separate defense, this defendant shows that the permanent plant erected in accordance with the Cotton Valley Unitization and Pressure Maintenance Agreement (completed about the month of May, 1941) was designed (from the inception of plans therefor) with facilities for the production and recovery of marketable or merchantable petroleum products, including those described in paragraphs A(1) and (3) of Plaintiff's Second More Definite Statement, which facilities and the operations thereof have at all times been essential and necessarily incidental to efficient production from the participating areas as expressly contemplated by the Unitization Agreement referred to, under the terms of which the precise nature of the several products which might be
370 produced or recovered was to be determined (from time to time) by the Cotton Valley Operators' Committee in the accomplishment of the most efficient and advantageous operation, and the prevention of waste of liquid hydrocarbons, and it specially shows that all said facilities (and the operations thereof) have at all times been essential and necessarily incidental to production from the participating areas as a component part of such production or mining operations which are not interstate commerce.

Twentieth Defense

For a further and separate defense, this defendant shows in the alternative that the permanent plant erected in accordance with the Cotton Valley Unitization and Pressure Maintenance Agreement (referred to and described herein) was erected in strict accordance with said agreement which expressly contemplated the operations mentioned;

and that said agreement, together with the facilities to be installed in the plant erected and the operations contemplated therein, were approved by the Commissioner of Conservation of the State of Louisiana through orders referred to in the complaint herein as a part of the scheme or plan adopted in respect to production from the participating areas mentioned in accordance with the conservation laws of the State of Louisiana for the purpose of conservation of said mineral resources and the maximum recovery thereof pursuant to the legislative scheme therefor, and that such scheme or plan and operations conducted thereunder are consequently not within the prohibition of the Sherman Act.

TWENTY-FIRST DEFENSE

In the alternative and as a separate defense, the rights of all of the defendants who are owners thereof to search for and produce liquid and gaseous hydrocarbons in the Cotton Valley Field are in the nature of in-
371 corporeal, real or immovable property and by the application of Order 10-C of the Commissioner of Conservation of the State of Louisiana, all of the separate rights of said defendants to so search and produce, became unitized into a single right of which right and the produce of the exercise thereof, said defendants became co-owners or owners in indivision. Under the laws of the State of Louisiana, no one of two or more co-owners has the exclusive right to any determinate part of the common property nor the right to dispose of the common property without the consent of the others. Under this condition, created by the plan for unit operation as prescribed by the Commissioner of Conservation of the State of Louisiana, in order that the products of the Cotton Valley Field might freely move in the channels of commerce, it was essential that the co-owners thereof enter into an agreement regulating their rights with respect thereto, which agreement is embodied in the Cotton Valley Unitization and Pressure Maintenance Agreement. By entering into this agreement and by the practices conducted thereunder, the co-owners of the products of the Cotton Valley Field became placed in such position that they may compete in the market with their products against the products of others and for the products of others and with each other for the same kind of products both as seller and buyer. Were it not for such regulation, the movement of the products of the Cotton Valley Field in the channels of commerce would be

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rendered difficult and at times practically impossible and such competition would become suppressed and perhaps entirely destroyed. Because of these conditions, the Cotton Valley Unitization and Pressure Maintenance Agreement and practices conducted by these defendants thereunder, are not within the purview of the Sherman Act.

TWENTY-SECOND DEFENSE

In the alternative, further and separate defense,
372 this defendant shows that the various respective interests of defendants in the oil, gas and liquids produced from the Cotton Valley Field are very small. The exact interest of each of these defendants will be shown on the trial of this case. No other method of handling these defendants' products is either feasible or practicable. For each of the defendants herein to have attempted to separately take or market its proportion of the products prior to the completion of the processing of same as is now being done through the plant, would cause great waste of products, would be in violation of the conservation acts of the State of Louisiana, would be contrary to the orders of the Commissioner of Conservation of the State of Louisiana, and would be contrary to the policy of the State of Louisiana as has been declared and enforced by the Commissioner of Conservation of said state. It was only through the joint effort of all of the defendants to this complaint in the operation of the Cotton Valley Field, as it has been and is now being operated, that such waste and such violation of the rules, regulations and laws of the State of Louisiana were prevented.

TWENTY-THIRD DEFENSE

The volume or quantity of production from the Cotton Valley Field is not sufficiently substantial to fall within the purview of the Sherman Act.

TWENTY-FOURTH DEFENSE

This defendant specifically requests and prays the Court to sustain from making any independent decision as to the effect of the applicable provisions of the Constitution of the State of Louisiana, statutes of the State of Louisiana, or administrative orders or interpretations of the respective departments of the State of Louisiana, relative
373 to conservation of minerals, prevention of waste, or correlative rights, should there be an absence of definitive decisions by the state courts of the State of

Louisiana on such purely local law questions involving property rights, unless and until such constitutional provisions, state statutes and administrative orders have been first construed by the state courts of Louisiana, and in such connection this defendant shows that this doctrine of abstention, here and now invoked, has peculiar and proper application to equity cases such as this suit where proper determination of state law questions should abide and await final decision and construction by state courts.

TWENTY-FIFTH DEFENSE

This defendant shows to the Court that the State of Louisiana, by and through its appropriate bureaus, departments and commissions, has assumed jurisdiction over the so-called processing of distillate, in that the State of Louisiana has approved the contract under which the plant of CVOC is operating, designated the operator, made mandatory the pooling of leases and unitization of the producing properties, all under the power of the State with reference to conservation, prevention of waste and correlative rights as to minerals and the owners thereof, which matters present varied, complicated and changing problems of primarily local concern which should be administered by the respective states in the orderly administration of their own state policy, and which should not be and which cannot be properly administered by federal courts, otherwise conflicts in policy and administration will result between the federal courts on the one hand and the state agencies, which are the best suited by training, personnel and expediency, on the other.

TWENTY-SIXTH DEFENSE

This defendant shows to the Court that, in so far
374 as the processing of distillate is concerned, the defendants who are members of CVOC and as such the operators of their jointly-owned plant, did acts and only such acts as were reasonable in the processing and treating of their own products, and if thereby commerce or competition was restrained in any respects, which is not admitted but denied, then and in such event such restraint was reasonable and the ordinary result of such joint ownership of products and processing plants, and in such connection this defendant shows that such processing and restraint, if any, was only the simple result that would necessarily flow from one person selling or one person buying to or from another, and that such processing and restraint,

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if any, was only the simple result that would customarily and necessarily flow from owners of undivided interests in lands sawing their timber in a jointly-owned portable saw mill, cooking their cane juice at a jointly-owned syrup mill, ginning their cotton at a jointly-owned cotton gin, curing their potatoes at a jointly-owned potato-curing plant, grading and packaging their tomatoes at a jointly-owned tomato shed, etc.

TWENTY-SEVENTH DEFENSE

This defendant shows to the Court that, in so far as the processing of distillate is concerned, the expansion of the jointly-owned plant of CVOC was only in keeping with the development and evolution in the industry and was to meet its legitimate business needs, especially since its expansion to date has by no means reached or achieved complete, vertical integration, but to the contrary such expansion is only on a very small portion of the petroleum industry, there being little transportation, no marketing and only superficial processing after production; in this connection defendant shows that it believes that CVOC
375 has no plans for entering fields other than that in which it is now operating and that its present position was not the result of evil intentions, immoral acts or illegal practices, nor has it been a calculated scheme to gain control over any appreciable segment of industry, nor has it used its position to intentionally exclude competitors in any real portion of the market, nor has its position been used as a leverage on any appreciable portion of the market, nor will its position be so used in the future.

TWENTY-EIGHTH DEFENSE

This defendant shows to the Court that the Government is seeking in this case, among other things, to prevent the processing of jointly-owned distillate by the actual owners thereof, in instances where individuals or private corporations are the lessors and where individuals or private corporations are the royalty owners, yet, this defendant shows to the Court that the Government, in instances where it is the lessor and royalty owner of mineral interests, is now placing in its mineral leases provisions broad enough to require that its lessees and operators of producing properties pool and unitize them with other leases and operators, and placing in such leases provisions broad enough to require that such lessees and operators process distillate, if any, produced from such premises at least to and possibly be-

yond the stage now reached by CVOC; that the applicable federal bureaus have issued regulations in keeping with the above-mentioned leases and allegations; that the applicable federal bureaus have issued statements to the same effect, and, this defendant charges on information and belief, have actually caused or will cause such processing in applicable instances; that such requirements in federal lands will result in discriminatory enforcement of the laws of
376 this nation as to processing of distillate depending upon who is the lessor, and the taking of the property of this defendant without due process of law under the Fifth Amendment to the Constitution of the United States.

TWENTY-NINTH DEFENSE

This defendant shows to the Court that would-be or prior purchasers of distillate in the market, if any, at Cotton Valley, Louisiana, have no vested rights as such purchasers in either forcing the continued production of gas from which distillate is derived, or the continuation of distillate as the end-product at the CVOC plant, but to the contrary no such vested rights exist regardless of whether or not the Cotton Valley field and the CVOC operations exist and are wholly-owned by one individual or one corporation, or by joint ownership or by joint operations; otherwise, whatever was the end-product at the moment would be frozen as such end-product and would be monopolized by the then purchasers with vested rights therein to all intents as though they owned such products; and otherwise an actual monopoly would be created in such purchasers.

THIRTIETH DEFENSE

Now comes defendant on information which it deems credible and verily believes and therefore charges as a fact and adopts and makes a part hereof as though fully copied herein each and every allegation contained in its "Joint Reply of Magnolia Petroleum Company to All Motions to Strike, Motion to Vacate, or Limit Defendant Magnolia Petroleum Company's Notice of Intention to Take Oral Depositions," and therefore charges that such allegations are true and correct, in whole and in part; that plaintiff knew that such allegations were true prior to the institution of this suit, and that plaintiff knew or should have known that this defendant had not violated and
377 was not violating any of the antitrust laws charges in this case, and that the institution of this suit for such purposes against this defendant constitutes the taking

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of its property without due process of law under the Fifth Amendment to the Constitution of the United States.

THIRTY-FIRST DEFENSE

This defendant shows to the Court that on or about and after September 13, 1945, when the CVOC decided to convert its plant to the further processing of distillate, which is actually the real complaint of the Government in this case and is actually the real complaint of the real parties at interest and for whose use and benefit this suit is brought, this defendant, Magnolia Petroleum Company, voted against such conversion, has and would vote against such conversion at all times since, and has and would vote for the selling of distillate by any member of CVOC to Premier Oil Refining Company of Texas, or its nominees or any other person, firm or corporation, and that consequently this defendant has at no time violated the antitrust laws in so far as the processing of distillate is concerned.

THIRTY-SECOND DEFENSE

Now comes defendant Magnolia Petroleum Company and affirmatively prays judgment of the Court declaring that the contract of the CVOC, as approved by the Corporation Commission of the State of Louisiana, be declared in all things legal and valid and not violative of federal antitrust laws, and this defendant further prays that the Court enter judgment declaring that the operations of the CVOC as formerly, presently, and as contemplated in the future be deemed to constitute no violation of the federal antitrust laws.

378 THIRTY-THIRD DEFENSE

Now comes defendant and prays the Court to balance the equities, conveniences and comparative injuries between granting an injunction on the one hand and the injuries and harmful effects to defendants and to the public generally on the other.

WHEREFORE, premises considered, this defendant prays judgment of the Court that plaintiff take nothing and that it go hence with its costs without day; this defendant prays judgment for declaratory relief as to the CVOC contract and the operations of CVOC.

DIXON CARROLL

Dixon Carroll
Ricou-Brewster Building
Shreveport, Louisiana

WALACE HAWKINS
EARL A. BROWN
CHAS. B. WALLACE

Chas. B. Wallace
2311 Magnolia Building
P. O. Box 900
Dallas, Texas
Tel. C-4131, Sta. 248, L. D. 246
Attorneys for Defendant
Magnolia Petroleum Company

I hereby certify that copy of the foregoing answer has been served upon the plaintiff through Malcolm E. Lafargue, United States Attorney, by mailing a copy of same, postage prepaid and properly addressed, to said Malcolm E. Lafargue, United States Attorney, on the 9th day of August, 1948.

DIXON CARROLL

Dixon Carroll
Of Counsel for Magnolia Petroleum Company, Defendant

(File Endorsement Omitted)

379 In United States District Court

(Title Omitted)

Designation of Additional Portions of the Record to be Included in the Transcript—Filed Nov. 23, 1949

To: Clerk of Court
United States District Court
Western District of Louisiana
Shreveport, Louisiana

Appellee, COTTON VALLEY OPERATORS COMMITTEE, reserving all rights under, and reasserting all contentions made in, the motion of J. J. Frommer to quash process and service of process, hereby directs you in preparing the transcript of the record in the above numbered and entitled cause for complainant's appeal to the Supreme Court of the United States to include therein, in addition to the portions of the record designated by appellant, the following:

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(1) Answer of Cotton Valley Operators Committee.
(2) This Designation.
(3) The attached Proof of Service.

s) Sidney M. Cook
Sidney M. Cook
s) Charles D. Egan
Charles D. Egan
Attorneys for Cotton Valley Operators Committee, Appellee
1500 Commercial Bank Building
Shreveport, Louisiana

380 Proof of Service

I certify that I am one of the attorneys for the appellee named in the foregoing designation, that the original was filed with the Clerk of the above-named Court on November 23, 1949, that copies thereof have been served upon appellant by mailing to each of the following:

Malcolm E. Lafargue
United States Attorney
Federal Building
Shreveport, Louisiana,

Daniel B. Britt
Special Assistant to the Attorney General
Department of Justice
Washington, D. C.,

Willard Memler
Special Attorney
Department of Justice
Washington, D. C.

a conformed copy of such designation.

I further certify that a conformed copy of such designation has been mailed to the attorneys of records for each of the other appellees.

Shreveport, Louisiana, November 23, 1949.

s) Charles D. Egan
Charles D. Egan
Attorney for Cotton Valley Operators Committee, Appellee
1500 Commercial Bank Building
Shreveport, Louisiana

(File Endorsement Omitted)

381 In United States District Court

(Title Omitted)

Answer of Cotton Valley Operators Committee—Filed June 10, 1949

COTTON VALLEY OPERATORS COMMITTEE, defendant herein, appearing under the compulsion of the Court's decision on the motion of J. J. Frommer to quash process and service of process, reserving all rights under, and reasserting all contentions made in, the said motion, answers plaintiff's complaint, as amended by its More Definite Statement and Second More Definite Statement, as follows:

382 FIRST DEFENSE

Plaintiff's complaint, as amended, fails to state a claim upon which relief can be granted.

SECOND DEFENSE

This defendant denies all of the allegations of paragraphs 1 and 2 of part I of the complaint, whether set forth as allegations of fact or conclusions of law, in so far as plaintiff therein alleges or charges that this defendant has violated provisions of the Act of Congress of July 2, 1890, Chapter 647, 26 Stat. 209, as amended, entitled "AN ACT to protect trade and commerce against unlawful restraints and monopolies," commonly known as the "Sherman Act."

THIRD DEFENSE

In answer to the allegations of paragraph 3 of the complaint, this defendant admits that the "Cotton Valley Operators Committee" was created and exists pursuant to and in accordance with the Cotton Valley Unitization and Pressure Maintenance Agreement entered into between the owners of rights (in whole or in part) to produce oil, gas or other hydrocarbons from certain horizons below the Travis Peak Formation within the Cotton Valley Field, which agreement is the best evidence of the nature and character of the committee created thereby which maintains offices in Cotton Valley and has recently sometimes held meetings in the Commercial National Bank
383 Building, Shreveport, Louisiana. Otherwise the allegations of said paragraph 3 of the complaint and the legal conclusions set forth therein are expressly denied.

FOURTH DEFENSE

In answer to the allegations of paragraphs 4, 5 and 6 of part II of the complaint this defendant admits that the

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corporations named in paragraph 4 and the individuals named in paragraph 5 of part II of the complaint are made defendants, it denies the allegations made in paragraph 6 of part II of the complaint that all of the persons and corporations listed in paragraphs 4 and 5 of part II of the complaint are members of the "operators' committee"; it shows that the Cotton Valley Unitization and Pressure Maintenance Agreement is the best evidence as to the parties signatory thereto, and the allegations of paragraph 6 of part II of the complaint as to those who are parties to the agreement are denied except in so far as they correspond with said agreement; otherwise the allegations of paragraph 6 of part II of the complaint are denied for lack of information.

Fifth Defense

In answer to the allegations of paragraph 7 of part III of the complaint, this defendant admits that there exists
384 in the Parish of Webster, Louisiana, an area generally known and described as the Cotton Valley Field from which oil, gas and other hydrocarbons have been produced from several separate structures or formations for a great many years. Defendant shows, however, that the Cotton Valley Unitization and Pressure Maintenance Agreement (referred to in the complaint) relates solely and only to production from certain horizons below the Travis Peak formation within that filed which includes a relatively small proportion of crude oil deemed immaterial to the matters mentioned herein.

Sixth Defense

In answer to the allegations of paragraph 8 of part III of the complaint, this defendant shows that all hydrocarbons (except for the immaterial proportion of crude oil mentioned) found within the horizons covered by the Cotton Valley Unitization and Pressure Maintenance Agreement exist only in gaseous form in the reservoirs containing the same and reach the surface as such in the course of the commercial production thereof; that the "natural flow" from these sands is in the form of gas from which commercially used hydrocarbons may be extracted; that the ratio of such gas to hydrocarbons which may be extracted therefrom in liquid form is in excess of ten thousand cubic feet of gas to one barrel of liquid and that such liquids so
385 extracted can be made marketable or merchantable only through converting the same into stable produ-

ucts through the processing thereof. Otherwise, the allegations of said paragraph 8 (not inconsistent with the foregoing statements) are admitted.

SEVENTH DEFENSE

In connection with the allegations of paragraph 9 of part III of the complaint, this defendant shows that in 1939 The Ohio Oil Company in connection with other defendants conducted certain experiments for the purpose of determining whether or not liquid hydrocarbons could be separated from the "natural flow" of wells in the Cotton Valley Field which were producing from horizons below the base of the Travis Peak formation, and the residue gas returned to the reservoir with a resulting conservation of liquid hydrocarbons and gas, and maintenance of pressures in the reservoir from which such hydrocarbons were produced; that by such experiments it was determined that liquid hydrocarbons could be recovered from the "natural flow" of such wells and the residue gas returned to the reservoir with a resulting maintenance of pressures in the reservoir, all contributing to and promoting the conservation of gas and liquid hydrocarbons in conformity with the public policy of the State of Louisiana as declared in the Constitution and statutes of said state; and that it was further deter-
386 mined by experiment that by further processing or fractionating the liquid hydrocarbons recoverable from the "natural flow" of such wells, said liquid hydrocarbons could be reduced to stabilized, merchantable or marketable liquids, suitable for transportation and in public demand, and that such processing and fractionating would be in accord with said public policy of the State of Louisiana in that the same would further contribute to the avoidance of physical waste of said liquid hydrocarbons.

Further replying to the allegations of said paragraph 9, this defendant states that in 1940 certain owners of rights (in whole or in part) to produce hydrocarbons from certain horizons below the Travis Peak Formation in the field entered into an agreement known as the "Cotton Valley Unitization and Pressure Maintenance Agreement" for the declared purpose of "more properly conserving the resources of said common oil, gas and other hydrocarbon field, pool or reservoir, and for the prevention of underground and surface waste". Said Agreement (which created the Cotton Valley Operators Committee, and pursuant to the terms of which said Committee exists) declared that it was in the public interest that a unit plan of development and oper-

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ation be adopted "to promote economical and efficient management, the maximum conservation and recovery of oil, gas and other hydrocarbons that may be produced from said Cotton Valley Field without waste, and a fair apportionment of the benefits involved among the parties
387 entitled thereto". It was provided in said agreement that the owners of the right, in whole or in part, to search for and produce oil, gas and other hydrocarbons within the Cotton Valley Field had considered plans for "the installation of a recycling, pressure maintenance and liquid hydrocarbon extraction and processing plant for the return to the reservoir or recycling of some or all of the gas which may be produced from the participating areas", which included certain parts of the field and certain gas producing horizons below the base of the Travis Peak Formation, and a committee of such persons, appointed in said agreement, was directed "to continue consideration of such plans and to work toward the completion of same, and, as soon as practicable, to arrange for the construction of a modern recycling pressure maintenance and liquid hydrocarbon extraction and processing plant, designed, constructed and maintained so as to comply with the best accepted engineering practices adapted to the most efficient, practical and economic operation, and the installation therein of all equipment necessary to the greatest practical, economic and efficient recovery and saving, and the conversion into marketable products of the liquid and liquefiable hydrocarbons from the gas and liquid hydrocarbons put through such plant".

In functioning under said Cotton Valley Unitiza-
388 tion and Pressure Maintenance Agreement, and in prosecuting the plan therein provided, this defendant acted in the belief that such agreement and plan, and the performance of such agreement and execution of said plan, were, and it is true that they were and are, necessary to the prevention of physical waste of liquid hydrocarbons and natural gas and that in the practical operation of the field it was both sanctioned and required by the conservation laws of the State of Louisiana; and this defendant alleges that said agreement and plan and the carrying out of the same, under the facts involved, were required by the laws of Louisiana prohibiting the waste of oil and gas. The acts of defendant under said agreement have been in accord with said agreement and the approval thereof by the Department of Conservation of the State of Louisiana, next hereinafter alleged.

Said Cotton Valley Unitization and Pressure Maintenance Agreement was submitted to the Department of Conservation of the State of Louisiana, and the Commissioner of Conservation, pursuant to the provisions of Act 225 of 1936 and Act 157 of 1940, by order No. 10-B, dated July 1, 1940, and Order No. 10-C, dated January 28, 1941, approved said agreement and provided special rules and regulations relating to the production of oil and gas, the recycling of gas, the unitization of ownership and the allocation and distribution of oil and gas production
389 from said field under the terms of said Agreement; and, in virtue of said Agreement and said approval thereof by the Commissioner of Conservation of the State of Louisiana, the ownership by the owners of rights (in whole or in part) to produce hydrocarbons, who were parties to said Agreement, of hydrocarbons in the lands and formations included in said Agreement became a joint ownership between them, their respective proportions of said ownership being as shown in said Agreement; and thereafter the production of gas and the extraction of liquid hydrocarbons therefrom and the processing of said liquid hydrocarbons were required by the laws of the State of Louisiana and the lawful orders of the Department of Conservation of the State of Louisiana.

Incidental to the common ownership among the parties to said Agreement of the gas and liquid hydrocarbons produced from the field and producing horizons involved in said Cotton Valley Unitization and Pressure Maintenance Agreement was, and is, the right to jointly process their said common property and jointly market those products that do not lend themselves to distribution in kind. In this connection defendant shows that, in fact, each operator (as defined in the Agreement), party to the Agreement, separately marketed its portion of all such products that were susceptible of division in kind and marketable under separate agreements made with each purchase and separately accounted to the owners of royalty and related rights therein; and that this authority to so sell the
390 portion of the products of each such operator has never been delegated to any common selling agent by implication or otherwise. However, in the alternative, should the Court find that the method employed by the parties to the aforesaid agreement did constitute joint marketing, which is denied, then in that event, defendant shows that such right to jointly market was a property

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right under the laws of the State of Louisiana as a result of the unitization features of said agreement which were necessary in order to comply with the laws and public policy of the State requiring the conservation of natural resources of the State.

All allegations of paragraph 9 of part III of the complaint which are or may be in conflict with the allegations of this paragraph of this answer are denied except that with respect to the allegations made therein as to the stipulations contained in the Cotton Valley Unitization and Pressure Maintenance Agreement, defendant shows that the said agreement is the best evidence of its contents and any allegations made that may be at variance with said agreement are denied.

EIGHTH DEFENSE

This defendant admits the allegations of paragraph 10 of part III of the complaint is so far as they allege a
391 delegation of power to the Commissioner of Conservation of the State of Louisiana by the Acts of 1936 and 1940 therein described and the issuance by said Commissioner of Order No. 10-B, dated July 1, 1940, and Order No. 10-C, dated January 28, 1941, approving the Cotton Valley Unitization and Pressure Maintenance Agreement, but this defendant denies the allegations of said paragraph 10 of part III of the complaint in so far as plaintiff there asserts that approval of such agreement "was only in so far as it provided for the unit operation and development of the area covered by the Agreement and the re-injection into the reservoir under pressure of a part of the liquid and gaseous hydrocarbons produced from said field", and in connection with its denial of said allegations of the complaint, this defendant alleges that the approval was of the entire plan set forth in said agreement, including the plan for the processing of said liquid hydrocarbons.

NINTH DEFENSE

In answer to the allegations of paragraph II of part IV of the complaint, defendant shows that the nature of the hydrocarbons first extracted or separated (at the plant referred to herein) in the course of production from the "D" and Bodcaw Sands of the Cotton Valley Field known as raw condensate or raw distillate is such that that
392 production cannot be marketed or otherwise handled (without tremendous physical and economic loss) in

the absence of further separation or processing for the purpose of producing or recovering the marketable products thereof, and that no portion of such liquid hydrocarbons have ever been or could have been shipped without processing as that term is defined in the more definite statement furnished by plaintiff in connection with said paragraph II; that all liquid hydrocarbons allocated to each operator in accordance with the provisions of the Cotton Valley Unitization and Pressure Maintenance Agreement (except toluene sold to the United States during the pendency of World War II) have been sold by such operator upon the open market as produced and allocated at prices then and there available and this defendant is consequently without information with regard to the ultimate consumption or use thereof. The remaining allegations of fact set forth in said paragraph II of part IV of the complaint are denied for lack of information sufficient to justify a belief in the truth of such averments and the legal conclusions set forth are specifically denied.

TENTH DEFENSE

This defendant denies the allegations set forth in paragraph 12 of part V of the complaint.

393 ELEVENTH DEFENSE

This defendant denies all of the allegations set forth in paragraph 13 of part V of the complaint, both as said paragraph was originally written and as it was amended or enlarged by paragraph 5 of the More Definite Statement filed by the plaintiff.

TWELFTH DEFENSE

This defendant denies the allegations of paragraph 14 of part V of the complaint.

THIRTEENTH DEFENSE

This defendant denies the allegations of paragraph 15 of part V of the complaint.

FOURTEENTH DEFENSE

This defendant denies the allegations of paragraph 16 of part V of the complaint, both as originally written and as amended or enlarged by paragraphs 6, 7 and 8 of the More Definite Statement filed by plaintiff.

FIFTEENTH DEFENSE

Except as hereinbefore or hereinafter expressly admitted, the averments of fact and conclusions of law set

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forth in plaintiff's More Definite Statement and Second More Definite Statement, are denied.

394 SIXTEENTH DEFENSE

This defendant denies every allegation, whether made as a conclusion of law or an allegation of fact, to the effect that it has formed an agreement, combination or conspiracy, or that it has agreed, combined or conspired with others to fix prices, or terms or conditions of sale, of products of the Cotton Valley Field, or to exclude other persons, firms or corporations from the business of extracting, processing or refining the products of the Cotton Valley Field; or that it agreed, conspired or combined with others to jointly sell at uniform prices, or otherwise, the liquid hydrocarbon products of said Cotton Valley Field; or that it agreed, conspired or combined with others to monopolize the transportation of the products of said field or to exclude others from engaging in the business of transporting said products; or that it agreed, combined or conspired with others to refuse to sell to any person the products of said field, or that it has in any other way violated the "Sherman Act".

SEVENTEENTH DEFENSE

The process of "recycling" as the term is used in the industry and comtemplated by Orders No. 10-B and No. 10-C of the Commissioner of Conservation of the State
395 of Louisiana, consists of the production of both liquid and gaseous hydrocarbons, the separation of the liquid from the gaseous hydrocarbons, the stabilization of the products into marketable condition, and the return to the formation from which they were produced of the hydrocarbons produced in excess of the market demand, and among the objectives sought to be accomplished by such process are to permit the most efficient extraction of the liquid products, to maintain reservoir pressure, reduce retrograde condensation and thus increase the efficiency of recovery from the reservoir of liquid hydrocarbons and promote conservation and prevent waste.

As initially produced and at the point at which the liquid hydrocarbons are separated from the gaseous hydrocarbons and the residue in excess of market demand is injected into the underground reservoir of the Cotton Valley Field, the products recovered and not reinjected are in the raw state and in an unstable condition so that it is impossible to deliver or market them until after they become stabilized by processing.

In the stabilization process, there are a variety of products into which the raw products may be converted and it is essential for the continued operation of the Field and production therefrom under Orders of the Commis-
396 sioner of Conservation of the State of Louisiana, that the products into which the raw production is stabilized, be marketable; otherwise, production must be halted when all storage facilities are filled and waste results from evaporation and other similar causes.

As a component and necessary part of the equipment required in order to comply with the recycling program ordered by the Commissioner of Conservation of the State of Louisiana and pursuant to the mandate of Article XI of the Cotton Valley Unitization and Pressure Maintenance Agreement, and to prevent waste, there was constructed and placed in operation, a recycling, pressure maintenance and liquid hydrocarbon extraction and processing plant. This plant has been improved from time to time to increase the efficiency of the recovery of stable, marketable products, to maintain continuous production from the Field and to return to the formation from which produced, all gaseous and liquid hydrocarbons for which there is no demand or market all for the purpose of realizing the greatest ultimate recovery of gas and liquid hydrocarbons from the common reservoir. All of these operations and practices thereunder are conducted strictly in accordance with the provisions of the Cotton Valley Unitization and Pressure Maintenance Agreement, and the portion of production which is allocated to each operator, after stabilization and apportionment, is sold by such operator on an open
397 and competitive market without restriction as to resale. Further, this defendant shows that all of such operations were and are inherently lawful in themselves as being effective and efficient means of preventing waste.

The recycling, pressure maintenance and liquid hydrocarbons extraction and processing plant operated as aforesaid, and the practices thereunder, have been operated and conducted for the purpose and with the intent of achieving the highest possible degree of efficiency and conservation, insuring the greatest ultimate recovery of both liquid and gaseous hydrocarbons from the Field, extending the probable length of the life of the Field, and reducing waste to the minimum and without any purpose or intent whatever to restrain trade or to create or maintain a monopoly.

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Neither the Cotton Valley Unitization and Pressure Maintenance Agreement nor any practices heretofore or now being conducted thereunder, would operate to restrain trade or create or maintain a monopoly or be calculated or have any tendency to produce any such result. On the contrary, said Agreement and practices operate as an aid to commerce in making available to market demand and for consumption, a variety of stabilized products and prevent or tend to prevent the monopolization by others of the market or demand for those products by increasing the number of people who can and in practice do engage in competition with others and each other in a highly competi-
398 tive persuit and because of the facts and reasons hereinbefore alleged, the Sherman Act is not applicable to the activities of this defendant.

EIGHTEENTH DEFENSE

The processing facilities and activities described above, are necessary component and integrated part of the production and recycling program prescribed by the Commissioner of Conservation of the State of Louisiana as a part of the plan adopted in accordance with the laws of the State of Louisiana for the purpose of conservation of the mineral resources and the maximum recovery thereof and are consequently not within the prohibition of the Sherman Act.

NINETEENTH DEFENSE

The processing facilities and activities described above, have been at all times essential and necessarily incident to efficient production from the Cotton Valley Field as a component part of such production and being of a purely local nature and having no effect upon nor tendency to have effect upon interstate commerce, are not within the purview of the Sherman Act.

399 TWENTIETH DEFENSE

The rights of all of the defendants who are owners thereof to search for and produce liquid and gaseous hydrocarbons in the Cotton Valley Field are in the nature of incorporeal, real or immovable property and by the application of Order No. 10-C of the Commissioner of Conservation of the State of Louisiana, all of the separate rights of said defendants to so search and produce, became unitized into a single right of which right and the produce of the exercise thereof, said defendants became co-owners or owners in indivision. Under the laws of the State of Louisiana,

until the gas, including the liquid hydrocarbons, has been put through the plant, and the products thereof reach a stage where they can readily be handled and divided in kind, no one of two or more co-owners has the exclusive right to any determinate part of the common property nor the right to dispose of the common property without the consent of the others. Under this condition, created by the plan for unit operation as prescribed by the Commissioner of Conservation of the State of Louisiana, in order that the products of the Cotton Valley Field might freely move in the channels of commerce, it was essential that the co-owners thereof enter into an agreement regulat-
400 ing their rights with respect thereto, which agreement is embodied in the Cotton Valley Unitization and Pressure Maintenance Agreement. By entering into this Agreement and by the practices conducted thereunder, the co-owners of the products of the Cotton Valley Field became placed in such position that they might compete in the market with their products. Were it not for such regulation, the movement of the products of the Cotton Valley Field in the channels of commerce would be rendered difficult and at times practically impossible and such competition would become suppressed and perhaps destroyed. Because of these conditions, the Cotton Valley Unitization and Pressure Maintenance Agreement and the activities of this defendant thereunder, are not within the prohibitory provisions of the Sherman Act.

For a further and separate defense, this defendant shows in the alternative that the respective interests of certain defendant-operators in and to the hydrocarbons produced from the Cotton Valley Field are very small. The exact interest of each defendant-operator will be shown on the trial of this case. No other method of handling such defendant-operators' products than that employed under the terms of the Agreement is either feasible or practicable. For each defendant-operator herein to have attempt-
401 ed to separately take or market its proportion of the products prior to the completion of the processing of same as is now being done through the plant, would cause great waste of products, would be in violation of the conservation acts of the State of Louisiana, and would be contrary to the public policy of the State of Louisiana as declared and enforced by the Commissioner of Conservation of said State. It was only through the joint effort in the operation of the Cotton Valley Field that such waste

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and such violation of the laws, rules and regulations of the State of Louisiana were prevented.

TWENTY-SECOND DEFENSE

The volume or quantity of production from the Cotton Valley Field is not sufficiently substantial to fall within the purview of the Sherman Act.

TWENTY-THIRD DEFENSE

For a further defense, this defendant shows in the alternative that, if any restraint of trade resulted from the action of defendants, which is denied, it was not such an unreasonable restraint as is prohibited by the Sherman Act.

402 PRAYER

WHEREFORE, Appearer prays that there be judgment in its favor and against plaintiff, rejecting the demands of plaintiff and dismissing this suit without the imposition of any cost on this defendant.

/s/ SIDNEY M. COOK
Sidney M. Cook
/s/ CHARLES D. EGAN
Charles D. Egan
1500 Commercial Bank Building
Shreveport, Louisiana
Attorneys for Cotton Valley Operators Committee.

Copies of the foregoing answer have been served upon the plaintiff and all defendants through their attorneys of record by depositing a copy of this answer in the United States mail in properly stamped and properly addressed envelope.

This 9th day of June, 1949.
/s/ CHARLES D. EGAN
Attorney for Cotton Valley Operators Committee

(File Endorsement Omitted)

403 In the United States District Court

(Title Omitted)

Designation of Additional Portions of the Record to be Included in the Transcript—Filed Nov. 30, 1949

To: The Clerk of the United States District Court for the Western District of Louisiana, Shreveport Division

Appellee Stanolind Oil and Gas Company hereby directs that in preparing the transcript of the record in the above numbered and entitled cause for the appeal by the United States of America to the Supreme Court of the United States, in addition to the portions of the record designated by appellant United States of America, you include the following:

1. Instrument filed by Stanolind Oil and Gas Company in June 1949, to-wit: an instrument entitled: "Objections of Defendant Stanolind Oil and Gas Company to Answering Interrogatories Filed by Plaintiff Unites States of America".
2. This designation of additional portions of the record.

Chas. L. Black
s) Dan Moody
Dan Moody
Austin, Texas
Attorneys for Defendant and Appellee Stanolind Oil and Gas Company

(File Endorsement Omitted)

404 I hereby certify that copies of the foregoing designation of additional portions of the record have been served upon plaintiff through Honorable Malcolm E. LaFargue, United States Attorney, Honorable Daniel B. Britt, Special Assistant to the Attorney General, and Honorable Willard R. Memler, Special Attorney, the attorneys of record for plaintiff, and upon the attorneys of record for each of the other defendants, by mailing a copy of the same, postage prepaid and properly addressed, to such attorneys on the twenty-ninth day of November, 1949; and I further certify that a copy of such additional designation was mailed to the Clerk of the above Court in Shreveport, Louisiana, on November 29, 1949.

s) Dan Moody
Attorney for Defendant and Appellee Stanolind Oil and Gas Company

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405 In the United States District Court

(Title Omitted)

(File Endorsement Omitted)

1. Objections of defendant Stanolind Oil and Gas Company to answering interrogatories filed by plaintiff United States of America.
2. Motion by defendant Stanolind Oil and Gas Company for an order sustaining the objections to the interrogatories.
3. Notice of motion by defendant Stanolind Oil and Gas Company for an order sustaining objections to the interrogatories.
4. Certificate of service.

Filed June 15, 1949

406 In the United States District Court

(Title Omitted)

Objections of Defendant Stanolind Oil and Gas Company to Answering Interrogatories Filed by Plaintiff United States of America

I.

General Objections to All the Interrogatories

1. By order of March 11, 1949, this Court sustained the Motion to Produce filed by The Ohio Oil Company under Rule 34 of the Rules of Civil Procedure, and by order of the same date this Court sustained a Motion to Produce filed by plaintiff United States of America. This defendant here adopts the motion so filed by defendant The Ohio Oil Company, and claims the benefit of the order sustaining it.

2. Defendant The Ohio Oil Company has complied with said order but plaintiff has not as yet complied with the order requiring it to produce certain documents, etc., in accordance with Rule 34; and this defendant objects to answering interrogatories filed herein by plaintiff until plaintiff has complied with said order to produce.

407 II.

Specific Objections to Certain Interrogatories.

1. Interrogatories Nos. 1 and 1a are objected to because plaintiff has a copy of the Cotton Valley Unitization Pressure Maintenance Agreement and the Minutes of said Committee.

2. Interrogatories Nos. 2 and 2a are objected to specifically because this information has heretofore been furnished to plaintiff in compliance with order of this Court,

plaintiff having been furnished with all proceedings, together with minutes of Cotton Valley Operators' Committee or Sub-Committee.

3. Interrogatory No. 3 is objected to for the reason that plaintiff has been furnished with copy of Cotton Valley Unitization and Pressure Maintenance Agreement, which answers this interrogatory; and that this interrogatory is merely for the purpose of harassment.

4. Interrogatory No. 4 is objected to for the reason that the information asked for in this interrogatory is contained in statement of the General Manager, which has been furnished to plaintiff.

5. Interrogatories Nos. 6, 6a, 7 and 7a are objected to as being irrelevant and immaterial, because it is not claimed in the petition or in the bill of particulars that the matters inquired about in those interrogatories were unlawful.

6. Interrogatories Nos. 8, 8a, 8b, 8c, 9 and 10 are objected to because the only hearings relating to pressure maintenance and recycling in the Cotton Valley field were had before the Commissioner of Conservation of the State of Louisiana; such proceedings were public in nature; all testimony was taken down and has been transcribed; all information called for in these interrogatories is
408 shown in the transcripts of those hearings; these transcripts can be obtained by plaintiff as easily as by defendant; and the only way defendant could answer interrogatories 8 to 10, inclusive, would be by supplying copies of transcripts of proceedings before the Commissioner of Conservation.

7. Interrogatories Nos. 11, 12, 13, 15 and 16 are objected to because this information is shown in report of the General Manager and summary of operations of Cotton Valley Operators' Recycling, Liquid Hydrocarbon Recovery and Maintenance Plant from May 1, 1941, to August, 1947, previously submitted to plaintiff.

8. Interrogatory No. 14 is objected to because it is not limited as to time to the period of the alleged violation as charged in plaintiff's pleadings, and therefore calls for a vast amount of immaterial facts.

9. Interrogatory No. 14 is objected to as being harassing and because it calls for information well known to plaintiff and that can be found in any recognized text book relating to the subject of the inquiry.

10. Interrogatories Nos. 17 and 18 are objected to for the reason set forth in paragraph 8 in objecting to Interrogatory No. 14, and because the information requested was available to plaintiff upon its examination of the records.

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11. Interrogatories Nos. 24, 24a, 25 and 25a are objected to because plaintiff does not exclude from the interrogatories or requests statements, if any, taken by counsel from officers and employees of the defendant or defendants who are clients of such counsel, and which were taken in preparation for trial of this case, and are privileged.

409 CONCLUSION

WHEREFORE, this defendant prays that the above objections to the interrogatories propounded by plaintiff be sustained; that defendant not be required to answer any of said interrogatories until after plaintiff has complied with the order of this Court of date March 11, 1949; but, if said objections are not sustained in their entirety, then, in the alternative, defendant prays that as to any interrogatories which the Court may rule this defendant must answer, that the Court allow this defendant sixty days within which to assemble the necessary information and make answer to such interrogatories as the Court may so rule must be answered.

Dated June 15, 1949.

CHARLES L. BLACK
C. L. Black
Austin, Texas

DAN MOODY
Dan Moody
Austin, Texas

Attorneys for Defendant Stanolind Oil and Gas Company

410 In the United States District Court

(Title Omitted)

Motion by Defendant Stanolind Oil and Gas Company for an Order Sustaining Objection to Interrogatories

Defendant Stanolind Oil and Gas Company respectfully MOVES this Court for an order sustaining its objections to the interrogatories of plaintiff UNITED STATES OF AMERICA.

CHARLES L. BLACK
C. L. Black
Austin, Texas

DAN MOODY
Dan Moody
Austin, Texas

Attorneys for Stanolind Oil and Gas Company

411 In the United States District Court

(Title Omitted)

Notice of Motion by Defendant Stanolind Oil and Gas Company for an Order Sustaining Objections to Interrogatories

To:

DANIEL B. BRITT,
Special Assistant to the Attorney General;

WILLARD R. MEMLER,
Special Attorney;

MALCOLM E. LAFARGUE,
United States Attorney:

PLEASE TAKE NOTICE that the attached MOTION will be presented to this Court at the earliest practicable time.

CHARLES L. BLACK
C. L. Black
Austin, Texas

DAN MOODY
Dan Moody
Austin, Texas
Attorneys for Defendant Stanolind Oil and Gas Company

412 Counsel for defendant Stanolind Oil and Gas Company hereby certifies that copy of the foregoing was served on counsel for plaintiff by mailing a copy thereof to the United States Attorney at Shreveport, Louisiana; and copies have been served on counsel for other parties to the suit either by mail or personal delivery.

DAN MOODY
Dan Moody
Austin, Texas
Attorney for Defendant Stanolind Oil and Gas Company

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413 In the United States District Court

(Title Omitted)

Designation of Additional Portions of the Record to be Included in the Transcript—Filed Nov. 30, 1949

To: The Clerk of the United States District Court for the Western District of Louisiana, Shreveport Division

Appellee Texas Gulf Producing Company, substituted as a defendant for Fohs Oil Company, hereby directs that in preparing the transcript of the record in the above numbered and entitled cause for the appeal by the United States of America to the Supreme Court of the United States, in addition to the portions of the record designated by appellant United States of America, you include the following:

1. Instrument filed by Texas Gulf Producing Company, substituted as a defendant for Fohs Oil Company, in June, 1949, to-wit: an instrument entitled:
   "Objections of defendant Texas Gulf Producing Company, substituted as a defendant for Fohs Oil Company, to Answering Interrogatories filed by Plaintiff United States of America".
2. This designation of additional portions of the record.

Chas. L. Black
Dan Moody
Dan Moody
Austin, Texas,
Attorneys for Defendant and Appellee Texas Gulf Producing Company

(File Endorsement Omitted)

414 I hereby certify that copies of the foregoing designation of additional portions of the record have been served upon plaintiff through Honorable Malcolm E. LaFargue, United States Attorney, Honorable Daniel B. Britt, Special Assistant to the Attorney General and Honorable Willard R. Memler, Special Attorney, the attorneys of record for plaintiff, and upon the attorneys of record for each of the other defendants, by mailing a copy of the same, postage prepaid and properly addressed, to such attorneys on the twenty-ninth day of November, 1949; and I further certify that a copy of such additional designation

was mailed to the Clerk of the above Court in Shreveport, Louisiana, on November 29, 1949.

DAN MOODY
Attorney for Defendant and Appellee
Texas Gulf Producing Company

415 In the United States District Court

(Title Omitted)

(File Endorsement Omitted)

1. Objections of defendant Texas Gulf Producing Company, substituted as a defendant for Fohs Oil Company, to answering interrogatories filed by plaintiff United States of America.
2. Motion by defendant Texas Gulf Producing Company for an order sustaining the objections to the interrogatories.
3. Notice of motion by defendant Texas Gulf Producing Company for an order sustaining objections to the interrogatories.
4. Certificate of service.

Filed June 15, 1949

416 In the United States District Court

(Title Omitted)

Objections of Defendant Texas Gulf Producing Company, Substituted as a Defendant for Fohs Oil Company, to Answering Interrogatories Filed by Plaintiff United States of America

I.

GENERAL OBJECTIONS TO ALL THE INTERROGATORIES

1. By order of March 11, 1949, this Court sustained the Motion to Produce filed by The Ohio Oil Company under Rule 34 of the Rules of Civil Procedure, and by order of the same date this Court sustained a Motion to Produce filed by plaintiff United States of America. This defendant here adopts the motion so filed by defendant The Ohio Oil Company, and claims the benefit of the order sustaining it.

2. Defendant The Ohio Oil Company has complied with said order but plaintiff has not as yet complied with the order requiring it to produce certain documents, etc., in accordance with Rule 34; and this defendant objects to answering interrogatories filed herein by plaintiff until plaintiff has complied with said order to produce.

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II.

Specific Objections to Certain Interrogatories

1. Interrogatories Nos. 1 and 1a are objected to because plaintiff has a copy of the Cotton Valley Unitization Pressure Maintenance Agreement and the Minutes of said Committee.

2. Interrogatories Nos. 2 and 2a are objected to specifically because this information has heretofore been furnished to plaintiff in compliance with order of this Court, plaintiff having been furnished with all proceedings, together with minutes of Cotton Valley Operators' Committee or Sub-Committees.

3. Interrogatory No. 3 is objected to for the reason that plaintiff has been furnished with copy of Cotton Valley Unitization and Pressure Maintenance Agreement, which answers this interrogatory; and that this interrogatory is merely for the purpose of harassment.

4. Interrogatory No. 4 is objected to for the reason that the information asked for in this interrogatory is contained in statement of the General Manager, which has been furnished to plaintiff.

5. Interrogatories Nos. 6, 6a, 7 and 7a are objected to as being irrelevant and immaterial, because it is not claimed in the petition or in the bill of particulars that the matters inquired about in those interrogatories were unlawful.

6. Interrogatories Nos. 8, 8a, 8b, 8c, 9 and 10 are objected to because the only hearings relating to pressure maintenance and recycling in the Cotton Valley field were had before the Commissioner of Conservation of the State of Louisiana; such proceedings were public in nature; all testimony was taken down and has been transcribed; all information called for in these interrogatories is
418 shown in the transcripts of those hearings; these transcripts can be obtained by plaintiff as easily as by defendant; and the only way defendant could answer interrogatories 8 to 10, inclusive, would be by supplying copies of transcripts of proceedings before the Commissioner of Conservation.

7. Interrogatories Nos. 11, 12, 13, 15 and 16 are objected to because this information is shown in report of the General Manager and summary of operations of Cotton Valley Operators' Recycling, Liquid Hydrocarbon Recovery and Maintenance Plant from May 1, 1941, to August, 1947, previously submitted to plaintiff.

8. Interrogatory No. 14 is objected to because it is not limited as to time to the period of the alleged violation as charged in plaintiff's pleadings, and therefore calls for a vast amount of immaterial facts.

9. Interrogatory No. 14 is objected to as being harassing and because it calls for information well known to plaintiff and that can be found in any recognized text book relating to the subject of the inquiry.

10. Interrogatories Nos. 17 and 18 are objected to for the reason set forth in paragraph 8 in objecting to Interrogatory No. 14, and because the information requested was available to plaintiff upon its examination of the records.

11. Interrogatories Nos. 24, 24a, 25 and 25a are objected to because plaintiff does not exclude from the interrogatories or requests statements, if any, taken by counsel from officers and employees of the defendant or defendants who are clients of such counsel, and which were taken in preparation for trial of this case, and are privileged.

419

CONCLUSION

WHEREFORE, this defendant prays that the above objections to the interrogatories propounded by plaintiff be sustained; that defendant not be required to answer any of said interrogatories until after plaintiff has complied with the order of this Court of date March 11, 1949; but, if said objections are not sustained in their entirety, then, in the alternative, defendant prays that as to any interrogatories which the Court may rule this defendant must answer, that the Court allow this defendant sixty days within which to assemble the necessary information and make answer to such interrogatories as the Court may so rule must be answered.

Dated June 15, 1949.

CHARLES L. BLACK
C. L. Black
Austin, Texas

DAN MOODY
Dan Moody
Austin, Texas
Attorneys for Defendant
Texas Gulf Producing Company

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420 In the United States District Court

(Title Omitted)

Motion by Defendant Texas Gulf Producing Company, Substituted as a Defendant for Fohs Oil Company, for an Order Sustaining Objection to Interrogatories

Defendant Texas Gulf Producing Company, substituted as a defendant for Fohs Oil Company, respectfully MOVES this Court for an order sustaining its objections to the interrogatories of plaintiff UNITED STATES OF AMERICA.

CHARLES L. BLACK
C. L. Black
Austin, Texas

DAN MOODY
Dan Moody
Austin, Texas
Attorneys for Defendant Texas Gulf Producing Company

421 In the United States District Court

(Title Omitted)

Notice of Motion by Defendant Texas Gulf Producing Company for an Order Sustaining Objections to Interrogatories

To:

DANIEL B. BRITT,
Special Assistant to the Attorney General;

WILLARD R. MEMLER,
Special Attorney;

MALCOLM E. LAFARGUE,
United States Attorney:

Please take notice that the attached MOTION will be presented to this Court at the earliest practicable time.

CHARLES L. BLACK
C. L. Black
Austin, Texas

DAN MOODY
Dan Moody
Austin, Texas
Attorneys for Defendant Texas Gulf Producing Company

422 Counsel for defendant Texas Gulf Producing Company hereby certifies that copy of the foregoing was served on counsel for plaintiff by mailing a copy thereof to the United States Attorney at Shreveport, Louisiana; and copies have been served on counsel for other parties to the suit either by mail or personal delivery.

DAN MOODY
Dan Moody
Austin, Texas
Attorney for Defendant
Texas Gulf Producing Company

423 *Clerk's Certificate to foregoing transcript omitted in printing.*

424 In the Supreme Court of the United States

Statement of Points to be Relied Upon and Designation of Parts of the Record Necessary for Consideration Thereof—Filed Jan. 5, 1950

1. Now comes the appellant in the above cause and for its statement of points upon which it intends to rely in its appeal in this Court adopts the points contained in its Assignment of Errors heretofore filed herein.

2. Those parts of the record in this cause which were filed in this Court pursuant to the appellant's praecipe to the Clerk of the United States District Court for the Western District of Louisiana, Shreveport Division, as supplemented by the counter designations of appellees Magnolia Petroleum Company, Cotton Valley Operators Committee, Stanolind Oil and Gas Company, and Texas Gulf Producing Company, are necessary for the consideration of the foregoing points, and appellant designates those parts of said record designated in said praecipe and counter designations and filed in this Court pursuant to said praecipe and counter designations for printing by the Clerk of this Court.

PHILIP B. PERLMAN
Solicitor General

Date: January 5, 1950

427 *Certificate*

I hereby certify that a true copy of the attached Statement of Points to be Relied upon and Designation of Parts of the Record Necessary for Consideration Thereof was duly served on all appellees on this 5th day of January,

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1950, by depositing in the United States mails copies thereof addressed to counsel for appellees.

CHARLES H. WESTON
Charles H. Weston
Special Assistant to the Attorney General

428 (File Endorsement Omitted)

429 Supreme Court of the United States

No. 490 ....., October Term, 1949

Order Noting Probable Jurisdiction—January 9, 1950

The statement of jurisdiction in this case having been submitted and considered by the Court, probable jurisdiction is noted.

Mr. Justice Douglas and Mr. Justice Clark took no part in the consideration or decision of this question.

☆ U. S. GOVERNMENT PRINTING OFFICE: 870419 NO. 15....1950

In the District Court of the United States for the Western District of Louisiana, Shreveport Division

UNITED STATES OF AMERICA, PLAINTIFF

v.

COTTON VALLEY OPERATORS COMMITTEE, ET AL., DEFENDANTS

STATEMENT AS TO JURISDICTION

In compliance with Rule 12, as amended, of the Supreme Court of the United States, the United States of America submits herewith its statement particularly disclosing the basis upon which the Supreme Court has jurisdiction on appeal to review the judgment of the district court entered in this case on September 20, 1949. A petition for appeal is presented to the district court herewith, to-wit on November 16, 1949.

JURISDICTION

The jurisdiction of the Supreme Court to review by direct appeal the judgment entered in this cause is conferred by Section 2 of the Expediting Act of February 11, 1903 (32 Stat. 823), as amended by Section 17 of the Act of June 25, 1948 (62 Stat. 869; 15 U. S. C. 29).

867408—49——1

The following decisions sustain the jurisdiction of the Supreme Court to review the judgment on direct appeal in this case: *United States* v. *Yellow Cab Company,* 332 U. S. 218; *International Salt Company* v. *United States,* 332 U. S. 392.

STATUTE INVOLVED

Section 161 of the Revised Statutes (5 U. S. C. 22) provides as follows:

> The head of each department is authorized to prescribe regulations, not inconsistent with law, for the government of his department, the conduct of its officers and clerks, the distribution and performance of its business, and the custody, use, and preservation of the records, papers, and property appertaining to it.

THE ISSUES AND THE RULING BELOW

This is an equity suit brought by the United States on June 17, 1947 in the Federal District Court for the Western District of Louisiana against the Cotton Valley Operators Committee, an unincorporated association, and a number of corporations and individuals, all members of that committee, and all of whom are owners of the right to search for and produce oil, gas or other hydrocarbons in the Cotton Valley Field, Webster Parish, Louisiana. The complaint was brought under Section 4 of the Sherman Act (Act of July 2, 1890, 22 Stat. 209) charging defendants with engaging in a combination and

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conspiracy to restrain interstate commerce in the hydrocarbons taken from the Cotton Valley Field, in violation of Sections 1 and 2 of that Act; it prayed that the court cancel certain allegedly illegal agreements entered into by the defendants, and enjoin the defendants from engaging in other activities pursuant to this conspiracy.

Prior to the filing of the complaint, and since it has been filed, agents of the Federal Bureau of Investigation, pursuant to a request from the Antitrust Division, made an investigation of the facts relevant to possible violation of law by the defendants. In the course of this investigation, the agents made file searches of the defendants' files and interviewed officers and employees of the defendants as well as other persons. The agents did not obtain any signed written statements from any of the witnesses but reduced the results of their investigations to writing in the form of reports to the Attorney General.

Prior to the filing of the complaint the Attorney General had certain correspondence with various persons not parties to the action relative to the subject matter of the complaint. This correspondence was in the nature of information supplied by complainants.

Defendants moved for discovery under Rule 34 of the Federal Rules of Civil Procedure to require the Attorney General to produce "all reports * * * made by agents of the Federal Bureau of Investigation * * * during the

period * * * from February 1, 1946 to the date of institution of this action * * *" and "all letters, telegrams, and other communications, * * * together with copies of replies thereto, received by the Department of Justice * * * during the period from August 1, 1945 to the date of institution of this action from private individuals, corporations or associations * * *" relating to the questioned activities of defendants. A supporting affidavit of the secretary of defendant association was filed, stating that refusal to disclose this information "will materially hamper and delay defendants in their preparation for trial, will deprive them of materials required for the cross-examination of witnesses * * * and will unfairly operate to their prejudice."

The Government opposed the motion for discovery[1] and filed affidavits of the Attorney General, asserting that the documents were privileged and that it is exclusively within the authority of

[1] Issue was joined on this motion. The actual sequence of pleadings was this: Defendants' motion for production of documents was denied on April 21, 1948. Defendants moved to vacate the denial, and, on March 11, 1949, the court vacated the denial and granted the motion. On May 10, 1949, the Government moved to vacate the order of March 11, 1949. The Government's motion was denied on June 16, 1949, with additional time allowed for argument in the event the Government refused to produce the documents. Following further hearings, the complaint was dismissed on September 20, 1949, for the failure of the Government to comply with the order to produce.

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the Attorney General to determine whether such documents are privileged. The Government also offered to make available to defendants all documents obtained from any of them, all documents obtained from others which are intended to be used as evidence, and a list of all proposed witnesses.

Following submission of briefs and oral argument, the court ruled that the Government should submit the documents to the court, for its determination as to which, if any, were privileged, and which should be furnished to defendants. The Government refused to comply with this directive, whereupon the court entered an order dismissing the complaint on September 20, 1949.

THE QUESTIONS ARE SUBSTANTIAL

The extent of the privilege from court process of documents deemed by the executive branch of the Government to be confidential for reasons of public policy, has posed a substantial problem at least since Attorney General Lincoln appeared before the court in *Marbury* v. *Madison* and raised the claim of privilege with respect to certain facts relating to the commission issued Marbury by President Adams. The court indicated that if the Attorney General thought that any fact was communicated to him in confidence, he was not bound to disclose it (1 Cranch 137, 144), and, in the opinion, made the classic statement of the independence of the executive in political and dis-

cretionary matters (1 Cranch 164). Chief Justice Marshall, when sitting on Burr's trial, issued a subpoena to President Jefferson for the production of a letter sent by General Wilkinson to the President, which Burr affirmed contained information vital to his defense. Jefferson ignored the subpoena and directed the United States Attorney to produce only such portions of the letter as he deemed not to be confidential (David Robertson, Burr's Trials (1808) Volume 1, pages 177, 180, 186–188; Dillon, Marshall: *Life, Character, Judicial Services,* Volume 1, introduction pages 46–49; Ford, *Writings of Thomas Jefferson,* Volume 9, pages 55–57, 62).

Congressional recognition of the executive privilege is reflected in Section 161 of the Revised Statutes (5 U. S. C. 22), which provides that the head of each department is authorized to prescribe regulations governing the custody and use of records and paper appertaining to it. Department of Justice Order No. 2239, May 2, 1939 (11 F. R. 177A–107, Section 51.71) states that all official documents, files and records, including Federal Bureau of Investigation reports, are confidential, and forbids disclosure except by permission of the Attorney General. Such regulations have been held valid and binding by this court in connection with the attempt to obtain the production of Government documents in an action brought by a State against a private party. *Boske* v. *Comingore,* 177 U. S. 459; and see

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Ex parte Sackett (C. C. A. 9, 1935) 74 F. 2d 922.

Further, in the enforcement of criminal and regulatory statutes, the identity of, and the nature of communications from, persons who are complainants or informers are absolutely privileged by settled public policy. Effective administration of the antitrust laws requires the protection of private persons who perform their duty by aiding in enforcement. *Vogel* v. *Gruaz,* 110 U. S. 311, 314–16; *In re Quarles and Butler,* 158 U. S. 532, 535–36.

Since all antitrust investigations are now conducted by the Federal Bureau of Investigation and since much relevant and helpful information comes to the Department in the form of complaining and informing letters, the judgment of the district court in this case would, if permitted to stand, seriously interefere with the enforcement of the antitrust laws. But the problem is even broader; it concerns the entire Government in a wide variety of types and stages of litigation.[2]

[2] Related problems have arisen in various forms. The Court of Appeals for the Second Circuit has ruled that in criminal prosecutions brought by the United States the privilege will not be recognized, whether based on executive discretion or informant's immunity, if the documents are essential to the defense. The procedure followed is to submit the documents to the trial court for its determination whether they should be made available to the defendant. If that court denies defendant access, and its order is appealed, the documents are placed under seal and made part of the record on appeal. In effect, this rule shifts the determination of

The district court's order exceeded the limits of discovery authorized by the Federal Rules of Civil Procedure. Defendants' motion is a formalized dragnet, supported by an affidavit in most general terms. It aims to lay bare the entire work file of opposing counsel, without specific limitation or identification of the documents sought. In this instance, the motion encompasses reports and documents comprising mental impressions and evaluations, as well as correspondence of varying degrees of relevancy elicited on the assurance of being kept confidential. These documents are an integral part of the preparation of litigation by the Department of Justice as the Government's lawyer; indeed, this investigative work in antitrust cases has been undertaken by the Federal Bureau of Investigation only for

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whether the privilege is to be exercised from the executive to the court. *United States* v. *Andolschek*, 142 F. 2d 503 (C. A. 2); *United States* v. *Krulewitch*, 145 F. 2d 76 (C. A. 2), reversed on other grounds, 336 U. S. 440; *United States* v. *Beekman*, 155 F. 2d 580 (C. A. 2); *United States* v. *Grayson*, 166 F. 2d 863 (C. A. 2); and see *United States* v. *Cohen*, 145 F. 2d 82 (C. A. 2); *United States* v. *Ebeling*, 146 F. 2d 254 (C. A. 2). In other circuits, and in various types and stages of litigation, the privilege has been both honored, *Pacific-Atlantic S. S. Co.* v. *United States*, 175 F. 2d 632 (C. A. 4); *Ex Parte Sackett*, *supra*; *United States* v. *Kohler Co.*, 13 Fed. Rules Serv. 33.333 (E. D. Pa.); *United States* v. *Haugen*, 58 F. Supp. 436 (E. D. Wash.), affirmed, 153 F. 2d 850 (C. A. 9), and denied, *United States* v. *Coplon*, (D. D. C. 1949; Criminal No. 381–49); *U. S. ex rel. Touhy* v. *Ragen* (N. D. Ill., 1949, No. 48C448) (*Ex parte McSwain*), now on appeal to the Court of Appeals for the Seventh Circuit.

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the last few years, and was formerly conducted by the Antitrust Division itself. The district court's order clearly encroaches on the work product and necessary privacy of attorneys in preparation of litigation. *Hickman* v. *Taylor*, 329 U. S. 495.

We believe that the questions presented by this appeal are substantial and that they are of public importance.

Respectfully submitted.

(S) PHILIP B. PERLMAN,
Solicitor General.

NOVEMBER 7, 1949.

In the United States District Court for the Western District of Louisiana, Shreveport Division

Civil Action No. 2209

UNITED STATES OF AMERICA *vs.* COTTON VALLEY OPERATORS COMMITTEE, THE OHIO OIL COMPANY, ET AL.

On November 7, 1947, the Ohio Oil Company, one of the defendants in this case, filed a motion to require plaintiff to produce for inspection, certain documents, including reports of the Federal Bureau of Investigation, correspondence, etc., with various persons, all as stated in said motion, which is made part hereof. Similar motions were filed by the other defendants. The Court, having recalled and quashed certain sub-

poenas duces tecum, obtained ex parte by the Magnolia Petroleum Company, another defendant, for reasons stated in the written opinion of January 2, 1948, its attention was called to the fact that it had not passed upon the said motion of The Ohio Oil Company. Being of the impression that the latter was, in all material respects, similar to the motion to produce and subpoenas duces tecum previously disposed of on said January 2, 1948, the said motion of The Ohio Oil Company, was, on April 21, 1948, denied in a memorandum opinion filed April 22, and as appears from a written order to that effect filed June 1, 1948.

Counsel for other defendants had filed similar motions to produce and, at the several hearings, appeared and joined in the contentions of The Ohio Oil Company.

Thereafter, on August 26, 1948, the said The Ohio Oil Company filed a motion to vacate the said order of April 21, 1948, which had denied its motion to produce and this was argued and submitted on September 17, 1948. Subsequently, the matter was, on February 21, 1949, reset for hearing on March 11, 1949, at which time, having heard further arguments, it was ordered that the Government produce the documents requested by The Ohio Oil Company "with the right to submit to the Court for ruling any documents they desired to claim to be privileged."

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On May 10, 1949, plaintiff filed a motion to vacate said order of March 11, 1949, and on June 15, following, it was heard and defendants declined to accept the Government's offer of partial compliance by filing an abstract of factual information contained in the reports of the Federal Bureau of Investigation, and the Court indicated its purpose to adhere to the ruling requiring the Government to produce the documents. At this time counsel for the Government requested time to contact the Attorney General, before the Court finally ruled on the said motion to vacate, which was granted, and on the following day, June 16, 1949, when the hearing was resumed and the Court denied the said motion to vacate, counsel for the Government was given additional time to consult with the Attorney General as to whether the Court's order to produce would be complied with, and the question of what was to be done in case of refusal was reset for July 7, 1949.

On the last mentioned date, counsel for the Government appeared and submitted further authorities as to the right of the Attorney General to claim and for himself determine the question of privilege as to the documents called for in the motions to produce. Thereupon, after considering said cases, the Court stated from the Bench that to sustain this contention, would in effect, amount to an abdication of the Court's duty to decide the matter and leave it entirely in the hands of the Attorney General; that if the docu-

ments were submitted to the Court, with such claims as to privilege as the Attorney General desired to make, they would be considered and if it appeared, in the Court's judgment, that production of any part thereof would be injurious to public interest, they would be excluded; otherwise, the order to produce for the inspection of defendants would be sustained. This, having been declined, counsel was told that a reasonable time would be allowed for further consideration, and the latter, stating no additional time was desired, the Court announced that the only course left was to dismiss the complaint for failure to comply with its orders. All the motions by both sides, above enumerated, and the minutes of the Court, and notes of the court reporter are made part hereof.

It is therefore ordered, adjudged, and decreed that this cause be dismissed for the failure of plaintiff to comply with the Court's order to produce for its inspection the documents called for in the motions, so it could determine the question of privilege under the law.

Done and signed on this September 19th, 1949.

(S) BEN C. DAWKINS,
U. S. District Judge.

Filed September 20, 1949. Philip H. Mecom, Clerk, U. S. District Court, Western District of Louisiana.

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UNITED STATES DISTRICT COURT,
Western District of Louisiana.

This is to certify that the above and foregoing contained on this and preceding two pages is a true and correct copy of the original.

Sept. 26, 1949.

PHILIP H. MECOM,
Clerk.

By THOMAS W. THOMPSON,
Deputy Clerk.

In the United States District Court for the Western District of Louisiana, Shreveport Division

Civil Action No. 2209

UNITED STATES OF AMERICA
vs.
COTTON VALLEY OPERATORS COMMITTEE, THE OHIO OIL COMPANY, ET AL.

For Plaintiff: Tom C. Clark, Atty. Gen., Jno. F. Sonnett, Geo. B. Haddock, W. B. Watson Snyder, and Jas. R. Browning, Spl. & Assts. Atty. Genl.; Malcolm E. Lafargue, U. S. Attorney.

For Defendants: Jno. M. Madison; W. S. Wilkinson; Wilkinson, Lewis & Wilkinson; Jno. T. Gayton; J. R. Goff; and Sidney G. Meyers, all of Shreveport, La.; Vernon Roberts, Ada, Okla.

DAWKINS, Judge:

The general nature of the complaint in this case is described in the opinion filed herein on January 21, 1948. We now have for consideration three additional motions, to wit: (1) By some 20 odd defendants for a more definite statement of facts upon which the demand is founded; (2) By the Ohio Oil Co., for the production of certain documents; and (3) a motion to dismiss.

Taking these motions up in the order named (1) requests further information with respect to Articles 10, 11, 13, 14, 15 and 16 of the complaint.

The request as to paragraph 10 has been voluntarily answered by the complainant to the satisfaction of the defendants.

At the oral argument of this motion, after hearing both sides, the request as to Article 11 of the complaint consisting of paragraphs 2, 3, and 5, through 8, were denied from the Bench; while No. 4 had also been answered by complainant to the satisfaction of defendants.

As to Article 13 of the complaint referred to in paragraph 9 of the motion for particulars, the complainant is asked:

> What was the nature of any agreement (tacit or otherwise) between defendants herein (other than those agreements expressed and contained in the "Cotton Valley Unitization and Pressure Maintenance Agreement") to which it is claimed that this defendant was a party and when

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> and with whom such agreement or agreements made or by what acts or actions was such agreement or conspiracy made manifest?

Article 13 of the complaint alleges that:

> Said combination and conspiracy (to monopolize and restrain trade in the products of the field, other than what was reinjected for conservation and to increase production) has consisted of a continuing agreement and concert of action among defendants, the substance and terms of which were and are, defendants.

Then follows sub-paragraphs (a) through (d) charging that defendants did agree, while so engaged, "to exclude others" (a) from the business of extracting, processing, and refining various hydrocarbons; (b) from the business of distributing and selling said products; (c) to sell jointly through channels selected by themselves; and (d) to fix uniform prices, terms and conditions of sale, involving over 85 per cent of the "natural flow of liquid and gaseous hydrocarbons produced from the field and not reinjected therein."

The motion in paragraphs 9 through 15, both inclusive, requests that complainant (9) state the "nature of any agreements" with persons other than defendants, after unitization and pressure maintenance agreements, outside of and beyond the signed document approved by the Department of Conservation of the state, which

it is claimed defendants entered into, giving the names of the parties thereto besides themselves; (10) "by what means and in what manner * * * defendants undertook to exclude others" from any of such activities; (11) the nature of the business in which the defendants agreed to engage other than extracting and reinjecting the substances into the field, "Where the same was conducted; and at what point or in what manner or by what means could said operations be recognized or identified"; (12) the means and manner used to exclude others from the business of distributing and selling the products taken from the field; (13) nature of the agreement relating to sale and distribution, other than the sale of defendants' own products upon the open market, and with whom made; (14) through what channels did defendants agree to sell; with whom and how did such agreements arise, for how long did each continue, and how were such channels generally selected; (15) what were the prices, terms and conditions agreed upon and in what respects whose prices did not conform to those established and available upon the open market, as well as the persons and dates on which said agreements were made, etc.

As to paragraph 9 (Art. 13 of the complaint) the nature of the alleged agreement is described in general terms in said paragraphs 13 (a) through 13 (d) of the complaint, as having been between the large number of defendants charged,

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sufficiently, it is believed, to apprise them that it was to permit them to control the residue of production remaining after extracting and reinjecting certain elements into the field for the purpose of greater recoveries, including refining, distributing and selling at uniform prices agreed on between them and by excluding all others from any of these activities.

The details as to which of the defendants refined, distributed, shipped, marketed or sold these products and fixed the prices therefor, including the choosing of the channels of operations, to the exclusion of others, whether carried on through third persons or agencies or by the defendants themselves, involved matters of evidence or proof, it is believed, which did not have to be alleged. Defendants may have recourse to interrogatories under No. 33 of the Rules of Federal Procedure for any additional information to which they may be properly entitled.

Paragraph 16 of the motion deals with Article 14 of the complaint. This article charges as follows:

> 14. The continuing agreements, understandings and concerted action of the defendants set out in paragraphs 11 and 12 of this complaint do not contribute to the conservation of the oil and gas resources of the Field or of the State of Louisiana, or prevent the waste and depletion thereof. Said agreements, understandings and con-

certed action are not necessary, and do not contribute, to the separation of any of the liquid and gaseous hydrocarbons taken from the Field, nor to the reinjection of a residue of liquid and gaseous hydrocarbons under pressure into the natural reservoirs of the Field. Said agreements, understandings and concerted action are not authorized by Act Number 225 of the legislature of the State of Louisiana of 1936, Act Number 157 of the Legislature of the State of Louisiana of 1940, nor by Order Number 10–B, dated July 1, 1940, Order Number 10–C, dated January 28, 1941, nor any other order issued by the Commissioner of Conservation of the State of Louisiana.

Defendants asked "in what respects * * * it is claimed that * * * operations * * * by defendants did not contribute to conservation * * * or were not authorized by statute or order of the Commissioner of Conservation * * * and at what point in the course of such operations did defendants depart from conservation and administrative authority?"

It must be assumed, it would seem, that in the course of the investigation preceding the filing of the complaint, complainant determined the nature of the operation up to the point where permissible acts of conservation ended and the alleged illegal combination and conspiracy in restraint of trade and commerce began. In order to prevail, it will have to make proof of this sufficiently to

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enable the Court to draw the line and be able to say that "so far your conduct was proper, but beyond this, you began to violate the Sherman Act." The situation presented in this case is unique, in that the complaint as pointed out in the former opinion, set forth the background and history of operations in this field, which it says were proper acts of conservation, having the approval of the state agency, even though the defendants were acting in concert. It then proceeds to charge that certain other activities which were necessary to a realization of the profits or benefits in money from production were illegal. Extraction of the elements from the field production, by refining or otherwise, their transporting and marketing, were not illegal in themselves, but became so only when a point had been reached where the public or those desiring, could participate therein under the conditions which prevailed. Was it at the mouth of the well where the carbohydrons were withdrawn, at the tanks if storage existed in the field, or at some other point, if the residue had to be transported by pipe lines? It can easily be conceived that a single extraction plant or a refinery existed in the field or vicinity, which was also operated by defendants, who conceived and put into effect the measures of conservation. If so, did any situation arise that compelled them to construct pipe lines or otherwise provide means of transportation for the use of competing refineries or operators, or *can it be*

made to appear that there were already operating, facilities of competitors, who were denied the right to purchase those products at points available to the public? It is true that defendants must be familiar with conditions in the area, and no doubt have in their possession, records of whatever transactions took place; but charges such as those made in the complaint are quasi criminal, and as defendants' counsel say, if the Government prevails, may be taken advantage of by other private litigants to recover triple damages from these defendants. In fact, the Sherman Act is primarily criminal in its nature, but permits civil remedies, such as are sought here by the Government, to prevent its violation; and the character of the combination and conspiracy should be set forth with sufficient particularity to permit defense, if such exists. *Facts should be furnished to show when and where the illegal activity began and by what means competitors were excluded.*

If the defendants in this case were stockholders or officers in a single corporation, operating in the Cotton Valley Field, there would appear to be no reason why they could not acquire any part of the production, transport it in the crude state, by pipelines or otherwise, separate its constituent elements in the field, if facilities existed there, or carry it to refineries operated by themselves and then distribute and sell the finished product, as is done by most big companies throughout the country. On the other hand, if, because of

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the peculiar conditions, it was necessary that the owners of independent interests in the field should pool the same for the purpose of efficient and profitable recovery, under a system recognized and approved by proper authorities, a point might be reached where a continuation of that pooling of interest might become illegal, if it involved a substantial portion of production, to which the public had access before the necessity for conservation measures arose, and they were denied such rights through refusal of defendants to permit these competitors to participate, after the acts of conservation had been completed. There should be some allegation of fact as to just what was done to bring about a monopoly and the exclusion of competitors other than the legal conclusions that such monopoly existed and caused the exclusions.

Paragraph 16 (a) through 16 (d) of the complaint, under the heading "effects" alleges that the conduct of defendants "excluded other persons and companies from the business" (a) of extracting and processing the hydrocarbons, (b) from selling and marketing, (c) transporting and (d) refining and distributing the same.

Defendants asked that complainant be required to give the names and manner in which other persons were excluded from all the activities covered by these four subdivisions of the complaint.

Here again, the complaint should give a reasonable outline of the conditions in the field that (1) made the products available to public participation in their commerce, and (2) *the available facilities and outlets making competition possible such as refineries, pipelines, etc., which were excluded.* In all other respects the motion for particulars or further statement of facts will be denied.

THE MOTION OF OHIO OIL COMPANY TO PRODUCE CERTAIN DOCUMENTS

The issues presented by this motion are the same as were considered in an almost identical motion by the Magnolia Petroleum Co. in the opinion handed down on January 21, 1948. After further consideration the Court is of the view that this motion should likewise be denied for the reasons stated in that opinion.

MOTION TO DISMISS

The motion to dismiss is based on the contention that in pooling their interests in the Cotton Valley field, pursuant to the requirements of the state statute and orders of the Conservation authorities, the defendants became owners in indivision of the production under their control, with the right to make agreements for handling it to their mutual profit or benefit; further, that the nature of the substances produced and the only means for separating the constituent elements for marketing made impracticable, though

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not impossible, a division in kind at any given point prior to realization, without consequent loss or added expense. State decisions, as well as Federal cases are cited to the point, that there is no ownership in these fugacious minerals until brought to the surface and reduced to possession, but only a common right in the surface owners to explore therefor and bring about such possession; from which it follows that the state, under its police power, may regulate the same by requiring, pooling and sharing in production, to prevent economic waste and to insure each surface owner his fair share.

There is no question, that, in Louisiana, the nature of the right of surface owners in minerals is such that the state possesses and in recent years has exercised extensively its power of control and regulation by compelling landowners in many fields, where ownership was in small tracts, to pool their interests and to share in production through one or more wells for an entire block, according to acreage owned. In such situation, up to the point where the minerals pass into commerce, there exists a joint or common enterprise. Usually, the drilling or marketing is done by one or more lessees, who provide storage or access to pipelines, and the surface owners are paid in accordance with what are commonly called "division orders".

However, where, as alleged here, 85 percent of the producing area is leased to a number of

lessees and they, together with the surface owners, are compelled, by virtue of the said requirements of conservation to pool that percentage of a field of the size of Cotton Valley, a situation is created whereby it is made possible for such a group, if the product happens to be of premium quality, to monopolize the same and to demand high prices, so long as competition can be kept out. And the temptation to do so is increased by the extent of participation of the several interests in those profits; whereas, if competition in the purchase, refining and marketing were allowed to have free play, such premium production might be held to its fair value by those who were willing to take a reasonable profit instead of demanding all the traffic would stand.

In general terms this appears to be what the complaint intends to charge; although as stated in passing upon the motion for particulars or a more definite statement of facts, it has not been made clear just where the line of demarcation between conservation and the alleged monopolistic operations lies. Undoubtedly, if persons, such as are the defendants, according to the complaint, without compulsion for conservation, voluntarily entered into an agreement to pool 85 per cent of production in a field such as this, and to exclude from participation all others, through all steps to ultimate realization of the profits or benefits, which are the controlling reasons for all business

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enterprises, it could hardly be contended that such a course was not within the purview of the anti-trust laws. If this were permissible as to one field, no reason can be seen why it could not be extended to others, and thus bring about a condition similar to that which precipitated dissolution of the original Standard Oil Company years ago.

It is believed that when complainant shall have complied with the ruling for a definite statement of the cause of action, the issues of fact and law will appear sufficiently to warrant a trial on the merits.

The motion to dismiss will therefore be overruled.

Proper decree should be presented.

Thus Done and Signed in Chambers at Monroe, Louisiana, on the 21 day of April 1948.

(Signed) BEN C. DAWKINS,
United States District Judge.

In the United States District Court for the Western District of Louisiana, Shreveport Division

Civil Action No. 2209

UNITED STATES OF AMERICA

vs.

COTTON VALLEY OPERATORS COMMITTEE, THE OHIO OIL CO., ET AL.

For Plaintiff: Tom C. Clark, Atty. Gen., Jno. F. Bennett, Geo. B. Haddock, W. B. Watson

Snyder, and Jas. R. Browning, Spl. Assts. Atty. Gen., Washington, D. C.; Malcolm E. Lafargue, U. S. Atty., Shreveport, Louisiana.

For Defendants: Jno. M. Madison; W. S. Wilkinson; Wilkinson, Lewis & Wilkinson; Jno. T. Gayton, J. R. Goff, Sidney G. Meyers, all of Shreveport, La.; Vernon Roberts, Ada, Oklahoma.

ON MOTION TO QUASH SERVICE

DAWKINS, J:

After due consideration of the motion to quash service of process, made by J. J. Frommer on whom it was served for the Cotton Valley Operators' Committee, without finding it necessary to enter into an extended discussion of authorities, this Court is of the opinion that the same should be and it is accordingly overruled. See *United Mine Workers* vs. *Coronado Coal Co.*, 259 U. S. 344; *U. S.* vs. *Greater N. Y. Live Poultry Chamber of Commerce*, 30 Fed. (2d) 939; *Dowd* vs. *United Mine Workers*, 235 Fed. 1; *Sperry Products, Inc.* vs. *Assn. American Railroads*, 132 Fed. (2d) 408; *Hecht, Trustees* vs. *Malley*, 265 U. S. 144; and *Federal Rules of Civil Procedure*, 17 (b)).

Thus done and signed in Chambers at Monroe, Louisiana, on this the 12th day of March, 1948.

(s) BEN C. DAWKINS,
United States District Judge.

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In the United States District Court for the Western District of Louisiana, Shreveport Division

Civil Action No. 2209

UNITED STATES OF AMERICA

vs.

COTTON VALLEY OPERATORS COMMITTEE, THE OHIO OIL CO., ET AL.

For Plaintiff: Tom C. Clark, Atty. Gen., John F. Sonnett, Geo. B. Haddock, W. B. Watson Snyder, & Jas. R. Browning, Spl. & Assts. Atty. Gen., Washington, D. C.; Malcolm E. Lafargue, U. S. Attorney.

For Defendants: John M. Madison; W. S. Wilkinson; Wilkinson, Lewis & Wilkinson; Jno. T. Gayton, J. R. Goff, Sidney G. Meyers, all of Shreveport, La.; Vernon Roberts, Ada, Okla.

DAWKINS, J:

The Government brought this suit under the provisions of Section 4 of the Act of July 2, 1890, c. 647, 26 Stat. 209, commonly known as the Sherman Anti-Trust Law, charging some fifteen corporations and eighteen individuals, with conspiring to "restrain unreasonably and to monopolize trade and commerce in the liquid and gaseous carbohydrates" taken from the Cotton Valley Field of Webster Parish, as follows;

> Said combination and conspiracy has consisted of a continuing agreement and concert of action among the defendants the

substantial terms of which have been and are the defendants.

(a) Agree to jointly engage in and exclude others from the business of extracting, processing and refining various separate hydrocarbons and hydrocarbon products from over 85% of the natural flow of liquid and gaseous hydrocarbons produced from said Field and not reinjected therein, which said business of extracting, processing and refining was in addition to that required to separate said hydrocarbons from said natural flow or to reinject the residue thereof into the Field;

(b) Agree to jointly engage in and exclude others from the business of distributing and selling all of the hydrocarbons and hydrocarbon products jointly extracted, processed or refined by the defendants from over 85% of the natural flow of liquid and gaseous hydrocarbons produced from the Field and not reinjected therein.

(c) Agree to jointly sell through channels of distribution jointly selected by the defendants all of the hydrocarbons and hydrocarbon products extracted, processed or refined by the defendants from over 85% of the natural flow of liquid and gaseous hydrocarbons produced from the Field and not reinjected therein.

(d) Agree upon fixed and uniform prices and terms and conditions of sale for each of the hydrocarbons and hydrocarbon products extracted, processed or refined by the defendants from over 85% of the na-

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tural flow of liquid and gaseous hydrocarbons produced from the Field and not reinjected therein, and agree to sell each of said hydrocarbons and hydrocarbon products at the said fixed and uniform prices and upon said terms and conditions of sale.

The bill itself, under the heading "Background" enumerates the conditions prevailing in the field, which brought about the original joint action of the defendants as follows:

> The Cotton Valley Oil Field is located in Webster Parish in the State of Louisiana. Whenever the term "Field" is hereinafter used, it is intended to mean the said Cotton Valley Oil Field including the natural underground reservoirs in said Field in which hydrocarbons are present.
>
> The Field contains hydrocarbons in both liquid and gaseous forms. These hydrocarbons are under high pressure within the reservoirs, and in the exploitation of the Field this pressure is utilized to bring both the liquid and gaseous hydrocarbons to the surface of the ground. This flow of liquid and gaseous hydrocarbons as it reached the surface is sometimes hereinafter referred to as the "natural flow" from the Field. The greater part of the hydrocarbons in the Field are found at depths in excess of 8,000 feet. The ratio of gaseous to liquid hydrocarbons in the Field is in excess of 10,000 cubic feet of gas to one barrel of liquid. The cost of

producing liquid hydrocarbons from individual wells is high. Rights to produce hydrocarbons from the Field are owned by more than thirty individuals and corporations. The production of gaseous and liquid hydrocarbons from the Field without reinjecting a part thereof into the Field would result in the rapid reduction of the underground gas pressure necessary to the ultimate recovery of both liquid and gaseous hydrocarbons from the Field. It is economically impracticable for individual owners to reinject a part of the gaseous and liquid hydrocarbons into the Field.

In an effort to find a solution to these problems the producers in the Field erected an experimental injection station in 1939. From this experiment it was determined that certain of the liquid and gaseous hydrocarbons could be separated from the natural flow from the reservoirs and the residue could be returned to the reservoirs under pressure, permitting the exploitation of the Field without serious reduction of the pressure within the natural reservoirs. To accomplish this objective the producers of over half of all gaseous and liquid hydrocarbons from the Field entered into an agreement in the spring of 1940 which is known as the Cotton Valley Unitization and Pressure Maintenance Agreement, hereinafter referred to as "the Agreement". Thereafter other producers of hydrocarbons from the

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Field joined and became parties to the Agreement, and at the time of the filing of this complaint the parties thereto produced in excess of 90% of all hydrocarbons taken from the the Field. All of the defendants herein are parties to the Agreement or participated in activities related thereto. The purpose of the Agreement as set out in the preamble thereof is that "of more properly conserving the resources of said common oil, gas and other hydrocarbon field, pool or reservoir, and for the prevention of underground and surface waste." The Agreement provides for the unitization of liquid and gaseous hydrocarbons within a substantial part of the underground reservoirs of the Field and the pooling of lands containing these substances, for the production of these substances by a joint agency to be known as the Operators' Committee, and the apportionment of the substance so produced to the owners of individual rights in the area covered by the Agreement on an agreed upon basis. The Operators' Committee is authorized by the Agreement to exercise the sole right to drill in the area covered by the Agreement with certain limited exceptions, to enter into contracts for the extension of that area and to plan, coordinate and execute the development and operations within that area for unitized substances. As a part of this development the Operators' Committee is specifically authorized to construct and maintain a

modern recycling, pressure maintenance and liquid hydrocarbon extraction and processing plant. The Agreement stipulates that all unitized substances produced from the area covered by the Agreement, except such as may be used for production or development purposes or for repressuring or recycling, shall be apportioned among the owners and allocated on an acreage basis to the several tracts of land comprising such area except that the Operators' Committee shall be empowered to dispose of the gas produced for all owners.

Pursuant to power delegated by Act Number 225 of the Legislature of the State of Louisiana of 1936, and by Act Number 157 of the Legislature of the State of Louisiana, of 1940, the Commissioner of Conservation of the State of Louisiana issued Order Number 10–B, dated July 1, 1940, and Order Number 10–C, dated January 28, 1941, approving the Agreement only in so far as it provided for the unit operation and development of the area covered by the Agreement and the reinjection into the reservoir under pressure of a part of the liquid and gaseous hydrocarbons produced from said Field.

The results of the alleged acts in restraint of trade and commerce are listed under the heading "Effects".

The aforesaid combination and conspiracy and the acts and things done by defendants informing and effectuating said

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combination and conspiracy, were intended by the defendants to and have had the following effects:

(a) Excluded other persons and companies from the business of extracting, processing and refining various separate hydrocarbons and hydrocarbon products, from over 85% of the natural flow of liquid and gaseous hydrocarbons produced from the Field and not reinjected therein;

(b) Excluded persons and companies other than the defendants and those jointly selected by the defendants from an opportunity to engage in the business of selling and distributing liquid and gaseous hydrocarbons jointly produced by the defendants from said Field and the hydrocarbon products jointly processed, extracted or refined by the defendants therefrom;

(c) Excluded persons and companies other than the defendants and those jointly selected by the defendants from an opportunity to engage in the business of transporting liquid and gaseous hydrocarbons jointly produced by the defendants from said Field and the hydrocarbon products jointly processed, extracted or refined by the defendants therefrom; and

(d) Eliminated competition among the defendants, and between the defendants and others, in the extraction, processing and refining, in the transportation, in the distribution, and in the sale of hydrocarbon products extracted from over 85% of the natural flow of liquid and gaseous hydro-

carbons produced from the Field and not reinjected therein.

The bill was filed on June 17, 1947. Numerous motions were presented by various defendants, and on October 22, 1947, the Government filed a motion to "strike or limit" defendant, Magnolia Petroleum Company's application to take oral depositions. Up to that time there was no record in this court of said Company's effort to take such depositions for the process had been gotten out in the Eastern and Southern Districts of Texas. Attached to the motion to strike were copies of notices, addressed to the Attorney General and some four of his assistants, to the United States Attorney of this district, and to the numerous attorneys representing the corporations and individuals, that the depositions would be taken as follows: On October 27, 1947, Tom Clark, Attorney General, Malcolm E. Lafargue, United States Attorney for this district, Myron Blalock and Jack Blalock of Marshall, Texas, and L. G. Dufilho of Shreveport, in the State Court House at Marshall, Texas; on October 28th, depositions of Sylvester Dayson (or Dyson), president of Premier Oil Refining Co. of Longview, Texas, and J. Zeppa of Tyler in the state courthouse of Tyler, Texas; and on October 29th, J. R. Parten, president Woodley Petroleum Co., Marlin Sandlin, Myron Blalock and Jack Blalock of Houston, Texas, in the state courthouse in that city.

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There was also attached to said motions to strike, of the plaintiff, subpoenas ducem tecum, or to produce, addressed to the Attorney General and to the said U. S. Attorney of this district, as follows: to Tom Clark, Attorney General, demanding that he produce at Marshall, Texas, at the time of giving his deposition on October 27, 1947, documents and records as set forth in the footnote below;[3] to Malcolm E. Lafargue, United States Attorney, documents and records as shown in footnote.[4]

---

[3] "All letters, telegrams, and other communications of every kind or copies thereof (together with copies of replies thereto) received by the Department of Justice of the United States (during the period extending from August 1, 1945, to the date of institution of this action) from private individuals, corporations or associations (including parties to this action) relating to methods of operations conducted by defendant, Magnolia Petroleum Company, or any other defendant herein, alone or in association with other defendants (or any number thereof) in or in connection with the production, processing and manufacturing of liquid and gaseous hydrocarbons produced from the Cotton Valley Field of Webster Parish."

[4] "All letters, telegrams, and other communications of every kind thereof (together with copies of replies thereto) received by the Department of Justice of the United States (during the period extending from August 1, 1945, to the date of institution of this action) from private individuals, corporations or associations (including parties to this action) relating to methods of operation conducted by defendant, Magnolia Petroleum Company, or any other defendant herein, alone or in association with other defendants (or any number thereof) in or in connection with the production, processing and manufacturing of liquid and gaseous hydrocarbons produced from the Cotton Valley Field of Webster Parish."

The grounds of the motion to strike or limit were as follows:

1. Said Notice was filed by defendant Magnolia Petroleum Company before answer without first obtaining leave of this Court.

2. Said Notice seeks to require the attendance of nonresidents of the district in which the depositions are to be taken in a county other than that in which served and at a place more than 40 miles from the place of service without an order of the Court.

3. The depositions to be taken pursuant to said Notice could not serve either the purpose of discovery or as evidence in the above entitled action.

4. The examination contemplated by said Notice would relate to matters which are privileged and which are not relevant to the subject matter involved in the above entitled action.

5. The examination contemplated by said Notice would relate to information obtained by the attorneys and agents of the Plaintiff in anticipation of litigation and in preparation for trial, and the mental impressions, conclusions, opinions and legal theories of said attorneys, and no showing has been made that denial of disclosure concerning said matters will unfairly prejudice the defendant Magnolia Petroleum Company or cause said defendant undue hardship or injustice.

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6. The taking of depositions contemplated by said Notice would cause unreasonable annoyance, embarrassment and oppression to the Plaintiff and to the witnesses.

7. Said Notice seeks to require the attendance of Tom C. Clark, Attorney General of the United States, at a place remote from his duties at the seat of Federal Government, in Washington, D. C., to submit to examination in a preliminary hearing relating to matters of State and of a confidential nature and not relevant to the subject matter involved in the above entitled case, without any showing as to the possible materiality of the testimony of said Tom C. Clark. That said Notice is therefore unduly oppressive and harassing, is contrary to the public interest, and is against public order.

8. Said Notice seeks to require the attendance of Malcolm E. Lafargue, United States Attorney, Western District of Louisiana, at a place remote from his office and duties at Shreveport, Louisiana, to submit to examination in a preliminary hearing relating to matters concerning which he has no personal knowledge, without any showing as to the possible materiality of his testimony. That said Notice is therefore unduly oppressive and harassing, is contrary to the public interest, and is against public policy.

9. That the examination contemplated by said Notice would relate to matters the

disclosure of which is prohibited by Department of Justice Order Number 3229, issued pursuant to the authority of Revised Statute 161, 5 U. S. C. 22.

(1) The motion to strike might be disposed of by a simple reference to Rule 26 (a) of the Rules of Civil Procedure, which allows the taking of depositions before issue joined, before the filing of an answer "by leave of the court" in which the suit is pending. No application was made to or granted by this court for the taking of said depositions. See Application of Wisconsin Alumni Research Foundation (D. C. N. Y. 1945) 4 F. R. D. 462; Deskin vs. Zinker, 6 F. R. D. 615. (Amendment to this rule has been made authorizing taking of depositions without permission of the court before issue joined but the Attorney General has given an opinion that it will not become effective until March 1948.) However, since the taking of the depositions was stayed by this court and the dates therefor have long since passed, it is thought proper for the guidance of the parties in the future, that the Court should rule upon the issues raised by the motion to strike.

(2) As to the notice to the Attorney General and his assistants, the court may take cognizance of the fact that his official duties are performed in Washington, D. C. many times the distance of 40 miles, within which a witness may be required to appear, and these witnesses can not be made to respond. Rule 45 (d) (2).

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As to the United States Attorney, Shreveport is some 37 miles from Marshall, Texas. The rule just cited provides that "a resident of the district in which a deposition is to be taken may be required to attend, etc. A non-resident of the district (in which the deposition is to be taken) may be required to attend * * * within 40 miles of the place of service, or at such other place as may be fixed by the court." In this instance there was no place fixed by the court, for the reason no order for the taking of the deposition of the District Attorney was obtained, but if the right to take it had existed at the time, without this order, then he was within the range which permitted him to be summoned to Marshall, Texas, since he was "a non-resident of the district" in which the deposition was to be taken.

(3) The third point of the motion to strike, that the "depositions could not serve the purpose of discovery or as evidence" involves much of what is raised in Nos. 4 and 5.

In response to the motion to strike, Magnolia Petroleum Co., at whose instance the notice to take the depositions was issued, has answered, stating in substance what it expected to prove thereby (a) that the suit of the Government was not filed in good faith, (b) that the United States is only a nominal party and the real plaintiff, not named in the case, is the Premier Oil Refining Company of Texas, "its president, officers, directors and stockholders", (c) that it was filed to pay

a political debt of the present national administration, (d) its purpose is to further the final interest of the said corporation, its officers and stockholders, (e) for which reasons the Plaintiff and the Attorney General come into court with "unclean hands", (f) that the purpose is to permit or foster a monopoly on behalf of said corporation in the Cotton Valley field, (g) that plaintiffs are using Woodley Petroleum Co., a subsidiary of the Premier Oil Refining Co., whose officers and stockholders are largely common to those of the former, as a nominal defendant to have it enter "a sort of plea of guilty and thereby 'run interference' for the plaintiff and the said Premier Oil Refining Co., to help it achieve a monopoly over distillate from the Cotton Valley Oil field or to insure a future treble damage suit for" it and plaintiff. The three succeeding paragraphs (h), (i) and (j) are largely elaborations of the preceding ones; (k) denies that the communications between the Attorney General and the persons named are confidential, (l) that the information sought would enable the Court to understand the "background" of the suit to enable it to balance equities, (m) unless it, Magnolia Petroleum Company is permitted access to the information thus sought, it would be "deprived of its day in court" and be denied due process of law. Paragraphs (n) and (o) are also elaborations of matters covered by preceding numbers.

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Rule 26 provides (a) for the taking of oral depositions "for the purpose of discovery or for use as evidence in the action or for both purposes * * * in accordance with these rules * * *;" (b) * * * regarding any matter, not privileged, which is relevant to the subject matter involved * * * in the pending action * * *.

Defendant, Magnolia Petroleum Company (called Magnolia) charges that the suit was not filed in good faith, not because it does not state a cause of action under the Sherman Anti-Trust Act, but because, as this defendant alleges, action was induced by political considerations and to pay a political debt to the Premier Refining Co. (called Premier), not made a party. It would seem sufficient to say that, if the complaint alleges facts, which, under the law, would entitle the plaintiff to relief, and this were substantially proven, the Court could not decline to award judgment even though it might have been inspired in the manner charged. Suppose, on final hearing it should be shown that defendants had violated the anti-trust statute to the extent and in the manner charged and Magnolia was able to show that the Attorney General, his assistants and the United States Attorney had acted at the instance of Premier for the reasons which Magnolia alleges, then this could not thwart a lawful result.

It is the conclusion that the matters charged in paragraphs (a) to (f) inclusive, show that the

testimony sought from the Attorney General and the United States Attorney is irrelevant.

As to the charge (h) that Woodley Petroleum Company (called Woodley) was made party defendant for the purposes stated, when in reality its interest was the same as Premier, if it should be found at the trial that the former is not a bona fide defendant, the bill as to it should be dismissed, and otherwise what has been said as to the preceding paragraphs applies in this instance.

With respect to the charge (i) that for the reasons alleged in the preceding paragraphs the plaintiff (United States) comes into court with "unclean hands", it is believed that this principle should be confined to matters wherein the party so charged was guilty of some act or acts which were similar to those complained of or attributed to the defendants, or that complainant had committed others of a nature such that good conscience with respect to the subject matter would not permit the complainant to be heard. The answer in no sense charges that these Government officers have participated in acts involving the merits of the matter, which would deprive the Government of its right to insist that the defendants be held to account for their alleged wrongdoing. A simple illustration, it is thought will serve to show the irrelevancy of these charges. Should the National Administration change be-

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tween now and the trial of this case on the merits, and the new Attorney General should determine to go forward with it, no one could seriously contend that the alleged conduct of the present officers could serve to prevent that course. Then, too, fundamentally, officers of the United States can not bind it either adversely or favorably by action intended to serve their personal ends. Its right to proceed and to have relief according to the facts proven under the complaint can not be diminished by the conduct of its agents. These observations apply equally to paragraphs (j) to (o) inclusive.

From what has been said it follows that the subpoenas ducem tecum should be recalled and quashed.

MOTIONS FOR MORE DEFINITE STATEMENT OF FACTS

Motions for more definite statement of facts have been filed by a number of defendants. Counsel for one or more of these have asked and will be granted further hearing thereon, and until this has been done, said motions will not be disposed of.

This course will also be pursued as to the exceptions that the complaint fails to state facts upon which relief can be granted. After the motions for more definite statements are out of the way, it will be time to determine whether the bill alleges a cause of action.

Proper decree should be presented.

Thus done and signed in Chambers at New Orleans, Louisiana, on this, the 21 day of January, 1948.

(S) BEN C. DAWKINS,
United States District Judge.

U. S. GOVERNMENT PRINTING OFFICE: 1949

In the Supreme Court of the United States

OCTOBER TERM, 1949

No. —

UNITED STATES OF AMERICA, APPELLANT

v.

COTTON VALLEY OPERATORS COMMITTEE, ET AL.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF LOUISIANA

APPELLANT'S BRIEF IN OPPOSITION TO MOTION TO DISMISS

Appellee, Magnolia Petroleum Company, has moved to dismiss the appeal upon the ground that the judgment of the district court dismissing the action is not a "final" judgment within the meaning of the Expediting Act of February 11, 1903, 32 Stat. 823, as amended by Section 17 of the Act of June 25, 1948, 62 Stat. 869, 989, 15 U. S. C., Supp. II, 29.

I

THE JUDGMENT DISMISSING THE ACTION IS A FINAL JUDGMENT

The first ground of appellee's motion is that the judgment is not final because it did not adjudicate

the merits of the controversy. We submit that *United States* v. *Wallace & Tiernan Co.*, 336 U. S. 793, conclusively establishes that a judgment not determining the merits is a final judgment if, as in the present case, it bars further prosecution of the particular proceeding. In *Wallace & Tiernan* the district court's judgment did not adjudicate the merits; it dismissed "without prejudice" a civil proceeding under the Sherman Act, upon the ground of want of prosecution. On appeal under the Expediting Act, this Court overruled appellees' motion to dismiss the appeal. It said (note 1, p. 795): "That the dismissal was without prejudice to filing another suit does not make the cause unappealable, for denial of relief and dismissal of the case ended this suit so far as the District Court was concerned." See also *United States* v. *National City Lines*, 334 U. S. 573, 577; *Bowles* v. *Beatrice Creamery Co.*, 146 F. 2d 774 (C. A. 10).

Appellee further suggests that the district court's judgment is not final because it resulted from the plaintiff's failure to comply with an order for the production of certain documents. But the finality of a judgment is determined by its effect, not by the reasons which led to its entry. In *Wecker* v. *National Enameling & Stamping Co.*, 204 U. S. 176, the federal trial court denied plaintiff's motion to remand the cause to the state court, whereupon the plaintiff refused to proceed with his case and the court entered judgment dismissing the action. This Court, on review of such judgment, noted that the

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plaintiff might have obtained a trial on the merits if he had been willing to recognize the jurisdiction of the federal court, but held that the judgment of dismissal was a "final judgment" in that it "terminated the action." 204 U. S. at pp. 181-182.

II

THE JUDGMENT OF DISMISSAL DISPOSED OF ALL CLAIMS WITHIN THE JURISDICTION OF THE DISTRICT COURT

The second ground of the motion to dismiss is that the district court's judgment did not dispose of a prayer for declaratory judgment, entitled "Thirty-second Defense," incorporated in appellee's answer to the complaint. The prayer was for a judgment declaring that the contract and operations of the CVOC are valid and not in violation of the federal antitrust laws. The relief thus requested was an adjudication against the United States as to the legality of certain conduct.

It is elementary that the United States may not be sued without its consent. The Sherman Act is a penal and regulatory statute and confers no right to obtain an adjudication as against the United States of what the law does or does not prohibit. Accordingly, unless some other statute or special legal principle authorized the declaratory relief sought by the appellee, the district court plainly was without jurisdiction to grant it.

The Declaratory Judgment Act, Title 28, United States Code, Sections 2201-2202, does not purport to waive sovereign immunity and the Act has been

expressly held not to grant the privilege of obtaining a declaratory judgment against the United States. *Larson* v. *Domestic & Foreign Commerce Corp.*, 337 U. S. 682. In that case suit was brought against a federal officer to obtain injunctive relief and a declaration of the rights asserted by the plaintiff. This Court held that the suit was, in substance, a suit against the United States and that it therefore had properly been dismissed for want of jurisdiction. The Court principally considered whether the injunctive relief sought was such as to make the suit one against the sovereign, but it held (n. 9, p. 689) that the prayer for declaratory relief was "even more clearly directed at the sovereign." The Court said (*ibid.*), "Such a declaration of the rights of the respondent [plaintiff] *vis-à-vis* the United States would clearly have been beyond the court's jurisdiction."

For other decisions holding that the Declaratory Judgment Act is not a waiver of the federal government's immunity from suit, see *Yeskel* v. *United States*, 31 F. Supp. 956, 958 (D.N.J.); *Twin Cities Properties, Inc.* v. *United States*, 81 Ct. Cl. 655, 658.[1]

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[1] State declaratory judgment statutes likewise have been held not to authorize suit against a state official to declare the rights of the petitioner against the state. *Bell Telephone Co.* v. *Lewis*, 313 Pa. 374 (1934); *International Mutoscope Reel Co.* v. *Valentine*, 247 App. Div. 130 (1936), affirmed *per curiam* 271 N.Y. 622. In the *Bell Telephone* case the court said (p. 375):

> We think it never was contemplated in enacting the legislation authorizing declaratory judgments that there

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The Government's immunity from suit, absent statutory waiver thereof, embraces claims asserted against it by way of cross claim or counter-claim. *United States* v. *Shaw*, 309 U. S. 495; *United States* v. *U. S. Fidelity & Guaranty Co.*, 309 U. S. 506. A court has no jurisdiction to adjudicate such a claim even though the United States fails to assert its immunity and, if the court does act on the claim, its judgment is void and subject to collateral attack. *U. S. Fidelity & Guaranty* case, at pp. 513-515.

We submit that the judgment of dismissal entered in the instant case disposed of the only claims over which the district court had jurisdiction, namely, the charges of violation of the Sherman Act made in the complaint filed by the United States, and that the judgment of dismissal clearly was, therefore, a final and appealable judgment.

Respectfully submitted,

PHILIP B. PERLMAN,
Solicitor General.

DECEMBER 1949.

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might be an order, judgment or decree against the State without its consent. To hold otherwise would be to subject the Commonwealth to all sorts of meddlesome, ill-founded litigation.

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In the Supreme Court of the United States

OCTOBER TERM, 1949

No. 490

UNITED STATES OF AMERICA, APPELLANT

v.

COTTON VALLEY OPERATORS COMMITTEE ET AL.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF LOUISIANA

BRIEF FOR THE UNITED STATES

OPINIONS BELOW

The district court did not file an opinion in support of its judgment dismissing the complaint but set forth the reasons therefor in a prior oral ruling (R. 217–218) and in its judgment and order of dismissal (R. 218–220). Opinions filed by the district court on certain preliminary motions and on a motion to dismiss the complaint for failing to state a cause of action (R. 45–54, 55, 56–62) are not yet reported.

JURISDICTION

The judgment of the district court was entered on September 20, 1949 (R. 218). The petition for

appeal was filed and allowed on November 16, 1949 (R. 220, 221). The jurisdiction of this Court is conferred by Section 2 of the Expediting Act of February 11, 1903, 32 Stat. 823, 15 U. S. C. 29, as amended by Section 17 of the Act of June 25, 1948, 62 Stat. 869. Probable jurisdiction was noted on January 9, 1950 (R. 267).

QUESTIONS PRESENTED

1. Whether there was a "showing of good cause" sufficient under Rule 34 of the Federal Rules of Civil Procedure to justify the order to produce entered by the district court.

2. Whether the district court's order required production of the work product of the lawyer and invaded the privacy essential to proper performance of his professional duties, and thus went beyond the discovery permissible under the Federal Rules of Civil Procedure.

3. Whether the documents which the district court ordered to be produced are "privileged" and, in the circumstances of this case, free from discovery.

STATUTE, ADMINISTRATIVE REGULATION, AND FEDERAL RULES OF CIVIL PROCEDURE INVOLVED

Section 161 of the Revised Statutes, 5 U. S. C. 22, provides:

> The head of each department is authorized to prescribe regulations, not inconsistent with law, for the government of his department, the conduct of its officers

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and clerks, the distribution and performance of its business, and the custody, use, and preservation of the records, papers, and property appertaining to it.

Department of Justice Order No. 3229, 11 F. R. 4920, provides:

> Pursuant to authority vested in me by R. S. 161 (U. S. Code, Title 5, section 22), *It is hereby ordered:*
>
> All official files, documents, records and information in the offices of the Department of Justice, including the several offices of United States Attorneys, Federal Bureau of Investigation, United States Marshals, and Federal penal and correctional institutions, or in the custody or control of any officer or employee of the Department of Justice, are to be regarded as confidential. No officer or employee may permit the disclosure or use of the same for any purpose other than for the performance of his official duties, except in the discretion of the Attorney General, The Assistant to the Attorney General, or an Assistant Attorney General acting for him.
>
> Whenever a subpoena *duces tecum* is served to produce any of such files, documents, records or information, the officer or employee on whom such subpoena is served, unless otherwise expressly directed by the Attorney General, will appear in court in answer thereto and respectfully decline to produce the records specified therein, on the ground that the disclosure

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of such records is prohibited by this regulation.

FRANK MURPHY,
The Attorney General.

Rule 34 of the Federal Rules of Civil Procedure, as amended, provides so far as pertinent:

> Upon motion of any party showing good cause therefor and upon notice to all other parties, and subject to the provisions of Rule 30 (b), the court in which an action is pending may (1) order any party to produce and permit the inspection and copying or photographing, by or on behalf of the moving party, of any designated documents, papers, books, accounts, letters, photographs, objects, or tangible things, not privileged, which constitute or contain evidence relating to any of the matters within the scope of the examination permitted by Rule 26 (b) and which are in his possession, custody, or control * * *.

Rule 26 (b) of the Federal Rules of Civil Procedure, as amended, provides:

> Unless otherwise ordered by the court as provided by Rule 30 (b) or (d), the deponent may be examined regarding any matter, not privileged, which is relevant to the subject matter involved in the pending action, whether it relates to the claim or defense of the examining party or to the claim or defense of any other party, including the existence, description, nature, custody, condition and location of any books, documents, or other tangible things and the

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identity and location of persons having knowledge of relevant facts. It is not ground for objection that the testimony will be inadmissible at the trial if the testimony sought appears reasonably calculated to lead to the discovery of admissible evidence.

STATEMENT

A. *The substantive charge.*—This is a civil proceeding brought by the United States in June 1947 against the Cotton Valley Operators Committee, an unincorporated association of owners of rights to produce oil and gas within the Cotton Valley Oil Field, Webster Parish, Louisiana, and various corporations and individuals, all owners of such rights and members of said Committee. The complaint charged that the defendants, appellees here, had conspired to restrain and monopolize interstate commerce in hydrocarbons taken from the Cotton Valley Field and in products made from such hydrocarbons, in violation of Sections 1 and 2 of the Sherman Act.

The allegations of the complaint (R. 1–9), as supplemented by "more definite statements" thereof filed by the plaintiff (R. 42–44, 64–71), may be summarized as follows:

The Cotton Valley Oil Field, which will be referred to as the Field, contains hydrocarbons in both liquid and gaseous forms. They lie at great depths under high pressure within the reservoirs, and this pressure is used to bring the liquid and gaseous hydrocarbons to the surface. This

pressure-induced flow to the surface is sometimes referred to as the natural flow from the Field. There would be a rapid reduction in the underground gas pressure necessary to ultimate recovery of the hydrocarbons in the Field without reinjecting a part thereof into the underground reservoirs. Such reinjection is not economically practicable for individual owners of producing rights in the Field, of whom there were more than 30 (R. 4).

In an effort to solve this problem, producers representing more than 50% of the Field's production entered into an agreement in June 1940 providing for the construction and operation of a recycling plant by a joint agency known as the Operators Committee. The agreement provided for separating and reinjecting into the underground reservoirs a part of the hydrocarbons obtained from the natural flow and for apportioning among the parties the balance of the hydrocarbons so obtained. This agreement and operations thereunder were approved by the Commissioner of Conservation of the State of Louisiana pursuant to statute.[1] They are not a part of the violation of the Sherman Act charged in the complaint (R. 4–5, 64–65).

[1] 1936 Acts of Louisiana, No. 225; 1940 Acts of Louisiana, No. 157. Orders of the Commissioner of Conservation No. 10–b, July 1, 1940, and No. 10–c, January 28, 1941.

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At or shortly after the recycling plant began operations in May 1941, the defendants agreed that they would jointly extract, process and refine various separate hydrocarbons and hydrocarbon products from that portion of the natural flow not reinjected into the Field.[2] They also agreed that they would jointly sell what they had jointly produced, at fixed and uniform prices and through jointly selected channels of distribution. Such joint activity is not authorized by the conservation laws of Louisiana or by the orders of its Conservation Commissioner, does not prevent waste of the oil and gas resources of the Field, and does not contribute to separating and reinjecting into the Field part of the hydrocarbons taken from it (R. 1–8, 65–67).

At all times during the period covered by the complaint, there were adequate facilities, other than those jointly operated by the defendants, for extracting, processing and refining separate hydrocarbons and hydrocarbon products obtained from that portion of the natural flow not reinjected into the Field. There were also pipeline connections available for transporting said portion of the flow to such facilities. By their combination, appellees have excluded others from

[2] They thus jointly processed and refined, among other things, normal-butane, iso-butane, propane, propane-butane mixture, toluene concentrate, gasoline, kerosene, fuel oil, residue, and kerosene-residue mixture (R. 65–66).

refining, selling and transporting hydrocarbons produced from the Field (R. 8–9, 67–71).

B. *The discovery proceedings in the trial court.*—In response to a motion under Rule 34 of the Federal Rules of Civil Procedure (*supra*, p. 4), filed by appellee Magnolia Petroleum Company,[3] the United States furnished 89 documents, a summary description of which covers seven pages of the printed record (R. 83–90). Pursuant to the district court's ruling on written interrogatories propounded by Magnolia under Rule 33, the United States classified and supplied the documentary evidence upon which it relied to establish the conspiracy charged in the complaint.[4] And in response to the Court's ruling on the same interrogatory, the United States furnished the names and addresses of all of its prospective witnesses (R. 168–169) and the oral statements made to it by the persons whom the United States expected to use as witnesses (R. 169–186).[5]

[3] The motion requested production of all "letters, copies, photostats, lists, abstracts, telegrams, memoranda or other writings taken from the files of CVOC or Woodley Petroleum Corporation, sent or received by any defendant, for the period January 1, 1938, to June 16, 1947," relative to nine specified issues (R. 78–79). Paragraph III of the motion also includes "tender tickets" and monthly reports" and paragraph IV "proposed and/or executed contracts" (R. 79).

[4] See Interrogatories Nos. 1 through 7–B and 13 through 15–A (R. 91–94) and the answers thereto (R. 165–167, 186–187, 192–193).

[5] No written statements had been obtained from the expected witnesses (R. 169).

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In addition, the Magnolia Petroleum Company, one of the defendants, served subpoenas *duces tecum* on the Attorney General and on the United States Attorney for the Western District of Louisiana, together with notice of Magnolia's intention to take their oral depositions (R. 15–17). After the government had filed a motion to strike or to limit the notice of intention to take depositions (R. 13–15),[6] the district court quashed the subpoenas (R. 54). In an opinion rendered on January 21, 1948, it held that the reasons asserted for taking the depositions and issuing the subpoenas—that the suit was induced by political considerations and was not brought in good faith—were irrelevant to the question of appellees' violation of the antitrust laws and therefore did not provide basis for the subpoenas or the proposed depositions (R. 45, 52–54).

A motion for production of documents was thereafter filed by the Ohio Oil Company under Rule 34 (R. 33, 77). It called for the production of the same documents as those demanded

[6] In support of its motion, the Government filed an affidavit of the Attorney General which stated in part (R. 25):

"That he has examined the subpoena *duces tecum* addressed to him in connection with the above entitled case, and that, in his opinion, the production of the records and documents requested therein would impede the Department of Justice in its enforcement of the law and would not be in the public interest."

in Magnolia's subpoenas *duces tecum*.[7] An order was sought requiring the United States to produce the following insofar as they relate to activities of the defendants in, or in connection with, the production, processing, and marketing of hydrocarbons produced from the Cotton Valley Field (R. 33):[8]

> 1. All reports (with exhibits attached thereto or filed therewith) made by agents or employees (or any agent or employee) of the Federal Bureau of Investigation to the Attorney General or to the Department of Justice of the United States during the period extending from February 1, 1946, to the date of institution of this action * * *.
>
> 2. All letters, telegrams, and other communications of every kind or copies thereof (together with copies of replies thereto) received by the Department of Justice of the United States (during the period extending from August 1, 1945, to the date of institution of this action) from private individuals, corporations or associations (including parties to this action) * * *.

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[7] Compare paragraphs (1) and (2) of the subpoenas (R. 19–20, 22) with paragraphs (1) and (2) of the Ohio Oil Company's motion (R. 33).

[8] The Ohio Oil Company's motion was adopted by various other appellees—Magnolia Petroleum Company (R. 210), Cotton Valley Operators Committee (R. 211), Stanolind Oil and Gas Company (R. 257), and Texas Gulf Producing Company (R. 262).

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The motion was supported by an affidavit by the Secretary of appellee Cotton Valley Operators Committee. The affidavit recites that agents of the Federal Bureau of Investigation had been given permission to examine the books and records of the Committee for the purposes of enabling them to make a report on the application of the federal antitrust laws to activities of the Committee; that such examination was made during the period February–June 1946; that the agents withdrew or made copies of various documents in the possession of the Committee or made available through it; that they had made a complete report of their investigation to the Attorney General; that the extent to which records, documents, etc., were obtained from the Committee or from other sources and the "nature of the evidence included in the reports made to the Attorney General" are unknown to persons outside the Department of Justice (R. 34–35). The affidavit then avers (R. 36):

> That to permit the government to refuse to disclose the information obtained through the investigation mentioned will materially hamper and delay defendants in their preparation for trial, will deprive them of materials required for the cross examination of witnesses and for a proper preparation for trial and will unfairly operate to their prejudice.

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The affidavit bears upon paragraph 2 of the motion to produce only to the extent that it avers that "affiant was informed by one of the agents referred to that the investigation being conducted was brought about as the result of requests made by individuals (or a private corporation or corporations for whom they acted), whose names, however, were not specified" (R. 35).

In an opinion filed on April 22, 1948, the district court held that the Ohio Oil Company's motion to produce presented the same issues as those on which it had ruled when it quashed the subpoenas issued on the request of the Magnolia Petroleum Company, and that the motion to produce should be denied for the reasons stated in the opinion quashing these subpoenas (R. 56, 61). After entry of a formal order denying the motion to produce (R. 63) and a motion to set aside this order (R. 77), the district court, at a hearing on March 11, 1949, orally reversed its denial of the motion to produce, but stated that it would determine the question of privilege as to all documents which the United States claimed to be privileged (R. 105, 159–160).

The United States filed a motion to vacate the order of March 11, 1949, and attached to its motion an affidavit by the Attorney General (R. 161, 162). The affidavit states in part (R. 163–164):

> That the efficient administration of the laws entrusted to his enforcement, as well

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> as the public interest require that the Attorney General keep as confidential investigatory reports made to him by agents of the Federal Bureau of Investigation relating to violations of Federal statutes;

The affidavit further states that the Attorney General "has determined and hereby asserts" that the reports of F. B. I. agents which the court had ordered produced "are privileged," but that he was willing that "all of the factual information contained in the reports may be extracted from the reports and presented to the Court for its determination as to whether or not such information is properly producible to the defendant for inspection and copying" (R. 164).

At a further hearing on June 16, 1949 (R. 196), counsel for the United States advised the court that he had personally gone through each report by an F. B. I. agent covered by the motion to produce and had "copied verbatim" the agent's statement of every interview he had had, whether favorable to the government or not, and his references to any documents which he had examined; that the portions of the reports thus copied ran to 175 pages of legal size; that the Attorney General waived his privilege as to such extracts but would like instructions within the Department of Justice to be kept confidential; and that the only things in the reports not included in the extracts submitted to the court were (1) "technical procedural matters" such as analysis of a

memorandum from an attorney in the case outlining information to be sought, (2) referrals of "leads" to agents in other parts of the country, and (3) at least two instances in which an agent, who was an accountant and had seen only part of the material obtained, had volunteered an opinion on the merits of the case (R. 197–198). Counsel further stated (R. 198):

> I am willing to permit the court to compare this with the original reports which I have with me to determine whether or not I have made a correct extraction, but the Attorney General has requested that offer be made on the condition that they not be turned over to the defendants.[9]

The court ruled that it would insist upon full production, but allowed counsel for the United States to consult with the Attorney General (R. 205, 208–209). After counsel had advised the court at a hearing on July 13, 1949, that the Attorney General adhered to the position taken at the preceding hearing, the court ruled that the documents covered by the motion of the Ohio Oil Company should be produced and that the court would then determine the question of privilege as to any document or part thereof claimed to be privileged (R. 213–218).

Judgment dismissing the complaint for failure to comply with the order to produce was entered

[9] For a repetition of this statement, see R. 204.

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on September 19, 1949 (R. 220),[10] and the United States has appealed from this judgment of dismissal.

SPECIFICATION OF ERRORS TO BE URGED

The district court erred—

1. In dismissing the complaint for failure of the plaintiff to produce reports of the Federal Bureau of Investigation during the period from February 1, 1946, to June 17, 1947, and correspondence of the Department of Justice during the period from August 1, 1945, to June 17, 1947, relating to the subject matter of the present action.

2. In granting the motion for production of the foregoing documents, as more particularly described in the motion, notwithstanding the affidavits of the Attorney General that in the public interest said documents are privileged and confidential.

3. In granting the motion for production of said documents, as more particularly described in the motion, in that the required production encroached upon the executive's authority under the Constitution and violated Section 161 of the Revised Statutes as implemented by the order made pursuant thereto by the Attorney General on May 2, 1939.

---

[10] Rule 37 (b) (2) (iii) provides that if a party refuses to obey an order made under Rule 34 the court may enter an order dismissing the action.

4. In granting the motion for the production of said documents in that good cause for their production was not shown, as required by Rule 34 of the Federal Rules of Civil Procedure, and in that the documents were not within the scope of the discovery provisions of Rule 34.

SUMMARY OF ARGUMENT

I

A. Appellees have failed to show the good cause required by Rule 34 as a condition to obtaining a court order directing another party to produce documents. Appellees' motion which the district court granted called for (1) reports made to the Attorney General by F. B. I. agents and (2) correspondence between the Department of Justice and private persons. Their supporting affidavit merely avers that nondisclosure of the information sought will prejudice the appellees in preparing for trial. Such general, stereotyped allegation could be made in any law suit, and does not constitute the precise and particular showing required by the Rule. Further, *Hickman* v. *Taylor,* 329 U. S. 495, 508, indicates that what constitutes a showing of "good cause" is to be judged in the light of information already supplied. Here the United States has already furnished all documents specifically requested, the names and statements of all prospective witnesses, and has offered verbatim copies of F. B. I. agents' reports of interviews, and all documents referred to

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in the F. B. I. reports. If a litigant requires discovery beyond this, a particularization of his need is essential to a showing of good cause.

B. The production of documents required by the district court's order exceeds the limits of permissible discovery under Rule 34. In *Hickman* v. *Taylor* this Court held that pretrial discovery did not encompass the production of the "work product" of a lawyer necessary to the privacy of preparation for litigation. There could hardly be a clearer invasion of that privacy than to require a lawyer to produce his correspondence relating to a case in litigation. The reports made by the agents of the Federal Bureau of Investigation are likewise the work product of the lawyer. To the extent that the F. B. I. agents are part of the legal staff in the case, the rule of the *Hickman* case applies directly. But in any event their investigations are directed and controlled by the lawyers in charge of the litigation, and their work is of the kind protected by the professional right to privacy. Even if there might be special and unusual circumstances justifying discovery of such documents, such circumstances are clearly lacking here.

II

Rule 34 exempts from discovery documents which are privileged. We contend that the documents here sought are privileged and that that is an independent ground for reversal of the

judgment below. But that contention, though independent, is not unrelated to the argument already advanced that the appellees have not shown sufficient justification for production under the Federal Rules. For when there is a substantial question of privilege raised, as here, the very existence of such question requires a stronger showing of need than might otherwise be demanded.

A. The privilege against disclosure which the Attorney General has asserted is directly supported by R. S. 161, which authorizes the head of a department to prescribe regulations not inconsistent with law for the government of his department and the custody, use, and preservation of the records pertaining to it. Pursuant to this authority, the Attorney General promulgated an order designating all official files and documents as confidential and forbidding disclosure except in the discretion of the Attorney General. *Boske* v. *Comingore,* 177 U. S. 459, directly establishes both that R. S. 161 authorizes the Attorney General's order and that this exercise of the authority granted by Congress is constitutional.

B. R. S. 161 is a reflection of the constitutional independence of the executive. The immunity from disclosure of materials deemed confidential by the executive has been consistently and successfully asserted as against congressional demands, and has been honored by the federal courts since the earliest days of the Republic. That the

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executive privilege is constitutionally supported is evidenced, too, by the recognition accorded it by state legislatures and courts, as well in the British law (see *Duncan* v. *Cammell, Laird & Co.* (1942) A. C. 624).

C. The privilege thus granted to the executive reflects an established public policy based upon several elements. Among them are the efficient administration of the government free from interference, secrecy of matters of national security, protection of communications by informants, as well as the independent functions of the executive and the judiciary. Whether the public interest permits disclosure is normally for the executive to determine. For it is executive officers who are responsible for the administration of the laws and who are in a position to evaluate the importance of keeping confidential particular information sought, in relation to an entire course of government policy or action.

D. The public interest in nondisclosure is no less in cases in which the Government is the moving party than in cases, like *Boske* v. *Comingore*, in which it is not. A rule-of-thumb doctrine of waiver of the privilege when the Government brings suit would force the Government to choose between faithfully executing its duty to enforce the laws and protecting the public interest against nondisclosure of confidential information. Such a mechanical conditioning of the rights of the

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Government is not adapted to appropriate accommodation of the various competing considerations.

E. In the circumstances of this case, however, it is not necessary to decide the extremely delicate question of how far the executive privilege should give way in order to assure a fair trial. In view of the disclosures already made by the United States and in view of the fact that in this case the problem arises before trial, no substantial ground has been shown for judicial review of the executive determination that disclosure of the documents sought would not be in the public interest.

ARGUMENT

I

IRRESPECTIVE OF THE QUESTION OF PRIVILEGE, THE DISTRICT COURT'S ORDER FOR THE PRODUCTION OF DOCUMENTS IS ERRONEOUS BOTH BECAUSE THE MOVING PARTY DID NOT SHOW "GOOD CAUSE" FOR THEIR PRODUCTION AND BECAUSE THE PRODUCTION REQUIRED EXCEEDS THE LIMITS OF PERMISSIBLE DISCOVERY UNDER THE FEDERAL RULES OF CIVIL PROCEDURE

A. *The moving party failed to show "good cause" for the production which the district court ordered.*—Rule 34 of the Federal Rules of Civil Procedure provides that upon motion of any party "showing good cause therefor" the court may order a party to produce any document in his possession, not privileged, which furnishes

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evidence relevant to the subject matter of the proceeding. (See also Rule 26 (b).) As this Court said in *Hickman* v. *Taylor,* 329 U. S. 495, 512, note 10, "Rule 34 is explicit in its requirements that a party show good cause before obtaining a court order directing another party to produce documents." The concurring opinion in that case further emphasized that the necessary foundation for an order under Rule 34 is lacking where "the demand is made on the basis of right, not on showing of cause" (329 U. S. 495, at p. 519).

In this case the appellees have made no showing of cause beyond a stereotyped allegation of advantage if production is ordered and disadvantage if it is denied. Since such allegation could be made in any case, a ruling that it is sufficient would in effect read out of Rule 34 the requirement that "good cause" be shown. The motion under Rule 34 which the district court granted called for (1) reports made to the Attorney General by F. B. I. agents and (2) letters, telegrams and other communications (together with the replies thereto) received by the Department of Justice from private individuals, corporations or associations (R. 33). The affidavit filed in support of the motion (R. 34–36) refers in some detail to an investigation made by agents of the Federal Bureau of Investigation and, with reference to defendants' need for the documents sought, merely avers that non-

disclosure of "the information *obtained through the investigation mentioned* will materially hamper and delay defendants in their preparation for trial, will deprive them of materials required for the cross examination of witnesses and for a proper preparation for trial and will unfairly operate to their prejudice" (R. 36). [Italics supplied.]

Such purely general allegations obviously find no special support in the circumstances of this case and could be made in every case in which the United States or any other party had investigated the facts in contemplation of litigation and had received written reports of the results of the investigatory reports."

The demand for the production of correspondence between the Department of Justice and others (see *supra*, p. 10) is not supported at all, unless a statement in the affidavit attached to the motion to the effect that one of the FBI agents had stated that the investigation had resulted from requests made by unnamed individuals (R. 35) is to be construed as support. In any event, there is no showing as to how or why disclosure of such communication would aid defendants in preparing for trial.

The Court of Appeals for the Third Circuit, sitting *en banc* in *Alltmont* v. *United States*, 177 F. 2d 971, has carefully considered the "good cause"

[11] More definite statements than this have been held insufficient as a showing of good cause. *Safeway Stores* v. *Reynolds*, 176 F. 2d 476, 478 (C. A. D. C.).

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requirement of Rule 34 in the light of this Court's decision in *Hickman* v. *Taylor*. Its conclusions follow (p. 978):

> In other words he must show that there are special circumstances in his particular case which make it essential to the preparation of his case and in the interest of justice that the statements be produced for his inspection or copying. His counsel's natural desire to learn the details of his adversary's preparation for trial, to take advantage of his adversary's industry in seeking out and interviewing prospective witnesses, to help prepare himself to examine witnesses or to make sure that he has overlooked nothing are certainly not such special circumstances since they are present in every case.

In *Martin* v. *Capital Transit Co.*, 170 F. 2d 811 (C. A. D. C.), the decision upholding denial of a motion under Rule 34 was based on *Hickman* v. *Taylor*. The court said (p. 812):

> Rule 34 authorizes the District Court to order production of documents, papers, etc., upon motion of a party "*showing* good cause," not upon a mere allegation or recitation that good cause exists. The rule contemplates an exercise of judgment by the court, not a mere automatic granting of a motion.

The court also said (p. 814):

> But it was not the duty of the District Court to search out a "good cause" for the production of the report.

> It was the duty of the appellant explicitly to show in his motion or by a supporting affidavit the need of the report for the purposes of the trial.

The sufficiency of a showing of "good cause" for production of documents is to be judged, at least in part, in the light of the information already supplied or offered in response to the motion to produce. Thus, in *Hickman* v. *Taylor,* this Court, in determining whether the discovery which was there sought went beyond the bounds permitted by the Federal Rules of Civil Procedure, gave considerable weight to the extensive information which had been obtained from the defendant under these rules (329 U. S. 495, at pp. 508–509, 513). Here the United States has already furnished a vast number of documents, the names of all of its prospective witnesses, and the statements made to it by those whom it expected to call as witnesses (*supra,* p. 8); it has offered to furnish all references to documents made in the reports by agents of the Federal Bureau of Investigation and, in addition, verbatim copies of the agents' reports of all interviews, agreeing to submit to the trial judge the documents from which these extracts were made in order that their accuracy might be checked (*supra,* pp. 13, 14). If any defendant required production and discover going beyond this, it would certainly seem that a particularization of his need would be essential to a showing of good cause.

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B. *The production of documents required by the district court's order exceeds the limits of permissible discovery under Rule 34.*—In *Hickman* v. *Taylor*, 329 U. S. 495, 500, this Court held that the "pre-trial deposition-discovery mechanism established by Rules 26 to 37" of the Federal Rules of Civil Procedure does not permit requiring counsel in a case to furnish either written statements which he had obtained from prospective witnesses or his report of statements made to him by prospective witnesses. The Court held (see p. 510) that such material is the work product of a lawyer, which "falls outside the arena of discovery and contravenes the public policy underlying the orderly prosecution and defense of legal claims." The Court said (pp. 510–511):

> In performing his various duties, however, it is essential that a lawyer work with a certain degree of privacy, free from unnecessary intrusion by opposing parties and their counsel. Proper preparation of a client's case demands that he assemble information, sift what he considers to be the relevant from the irrelevant facts, prepare his legal theories and plan his strategy without undue and needless interference.

The opinion concluded (p. 514):

> When Rule 26 and the other discovery rules were adopted, this Court and the members of the bar in general certainly did not believe or contemplate that all the files and mental processes of lawyers were

> thereby opened to the free scrutiny of their adversaries. And we refuse to interpret the rules at this time so as to reach so harsh and unwarranted a result.

There could hardly be a clearer invasion of that "degree of privacy" which is "outside the arena of discovery" than to require a lawyer to produce his correspondence relating to a case in litigation. Yet in the instant case precisely this demand was made and enforced. The district court's order requires the production of the correspondence relating to the case between the Department of Justice and "private" persons or corporations, in other words, the correspondence of the lawyers for the United States.

The reports made by agents of the Federal Bureau of Investigation are likewise within the scope of what constitutes a lawyer's essential working tools, and thus not within the discovery provisions of the Rules of Civil Procedure. To the extent that the investigating FBI agents are part of the legal staff in the case,[12] the *Hick-*

[12] Agents of the Federal Bureau of Investigation, when engaged in the preparation of litigation, are themselves a part of the legal staff in charge of the case. They are officers of the Department of Justice (5 U. S. C. 299, 300; *Cooper* v. *O'Connor*, 99 F. 2d 135, 139 (C. A. D. C.), certiorari denied, 305 U. S. 643, rehearing denied, 305 U. S. 673, 307 U. S. 651; *Weinberg* v. *United States*, 126 F. 2d 1004, 1008 (C. A. 2)), and may be ordered to perform the duties of any officer of the Department (5 U. S. C. 311), including the conduct of legal proceedings (5 U. S. C. 310).

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man case directly applies. But, in any event, their investigations of possible violations of the antitrust laws are directed and controlled, as to subject matter and scope, by the lawyers on the staff of the Antitrust Division of the Department of Justice,[13] and in this situation, the *Hickman* doctrine governs. In *Alltmont* v. *United States*, 177 F. 2d 971, *supra*, the court considered whether the *Hickman* doctrine applies to statements obtained from prospective witnesses, not by a lawyer himself, but by others acting on his behalf. The court of appeals' ruling has special pertinence here because the question in issue was whether parties who had instituted suit against the United States were entitled to obtain from it, through discovery proceedings, written statements of witnesses taken by agents of the Federal Bureau of Investigation. The court, in holding that such statements are within the rationale of the *Hickman* decision, said (p. 976):

> * * * we can see no logical basis for making any distinction between statements of witnesses secured by a party's trial counsel personally in preparation for trial and those obtained by others for the use of the party's trial counsel. In each case the

[13] Until comparatively recently, these lawyers themselves carried on most of the investigative work relating to violation of the antitrust laws. See Annual Report of the Attorney General, 1946, p. 354. Shift of this work to the Federal Bureau of Investigation was a matter of internal departmental administration.

> statements are obtained in preparation for litigation and ultimately find their way into trial counsel's files for his use in representing his client at the trial.
>
> * * * * *
>
> Certainly no valid distinction can be based on the fact that in the one case trial counsel does all the work of preparation for trial, including the interviewing of witnesses, while in the other case he is assisted by others employed by him or by his client. Indeed to make such a distinction would discriminate in favor of the party whose lawyer himself does all the work of preparation for trial and against the one whose counsel delegates part of that task to others.

In the *Hickman* case this Court said (pp. 511–512), that there might be special and unusual circumstances justifying discovery to obtain from the files of a lawyer written statements of prospective witnesses. But the Court said (p. 512) that it doubted that any circumstances would justify requiring production of oral statements made to him, whether or not embodied in memoranda. The present case involves the latter situation insofar as the FBI reports deal with persons interviewed by agents. Each such report sets forth merely the agent's recollection or summary of what the interviewee said; no written statements were obtained (*supra*, p. 8, note 5).

We submit, therefore, that under the *Hickman* case the United States might properly have de-

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clined any disclosure as to the contents of the FBI reports in its possession. Actually, it volunteered to produce all portions of the reports dealing with interviews and all references to documents made in the reports (*supra*, pp. 13–14).[14] The only matters withheld were references to memoranda outlining the scope and nature of the investigation to be made, exploratory references between FBI offices, and certain gratuitous expressions of opinion on the merits of the case made by one agent (*id.*). Plainly these are matters which, if relevant at all to defendants' needs in preparing for trial, are not so vital as "to permit * * * an exception to the policy underlying the privacy of [counsel's] professional activities" (329 U. S. at 513).

II

THE CORRESPONDENCE OF THE DEPARTMENT OF JUSTICE AND REPORTS OF AGENTS OF THE FEDERAL BUREAU OF INVESTIGATION WHICH THE DISTRICT COURT ORDERED PRODUCED WERE PRIVILEGED, AND THUS NOT SUBJECT TO DISCOVERY

Introduction.—Up to this point of the Argument, we have sought to demonstrate that Rule 34 of the Federal Rules of Civil Procedure does not, in the circumstances of this case and quite apart from any question of privilege, justify the issuance of an order to produce the documents in question. But beyond this, Rule 34 of the Fed-

[14] It also offered to submit the reports to the courts for verification of the accuracy of such extractions (*id.*).

eral Rules of Civil Procedure, quoted *supra*, p. 4, authorizes a court to order production of documents and other tangible things "not privileged."[15] The Rule therefore does not reach any matter which is privileged by statute, the Constitution, or the common law. Adoption of Rule 34 did not abridge or limit any privilege against disclosure so given.

Consequently, we must turn to the question of privilege. But at the outset, it is of the utmost importance to note that, despite the separate treatment given Rule 34 and the privilege in this brief, the two are, in the circumstances of this case, closely related. Whether "good cause" for production has been shown, or whether "adequate reasons to justify" "invading the privacy of an attorney's course of preparation" (*Hickman* v. *Taylor*, 329 U. S. 495, 512), have been made to appear, are both issues in the resolution of which a complex of factors must be considered. And, certainly, when, as we shall show, there is, at the minimum, a substantial claim of executive privilege standing in the way of discovery, the burden on the party seeking production of documents is even heavier than it might otherwise be to justify his demand. In other words, the very existence of a substantial question of privilege confirms the conclusion which we have drawn in

[15] Rule 26 (b), to which Rule 34 refers, likewise applies only to matter "not privileged." (See *supra*, p. 4.)

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Point I—that the appellees have not sufficiently justified their demands.[16]

The executive privilege does stand, moreover, as an independent barrier to the production of the documents which the district court ordered. And it is to establish that proposition that the remainder of this brief is devoted.

A. *Revised Statutes, Section 161, and valid regulations thereunder, vest in the Attorney General the power and duty to determine the privileged character of the documents which the district court ordered to be produced.*—The privilege against disclosure which the Attorney General has here asserted has the direct support of statute. Revised Statutes, Section 161, quoted *supra*, pp. 2–3, authorizes the head of each department of the government to prescribe regulations, not inconsistent with law, "for the government of his department" and "the custody, use, and preservation of the records, papers, and property appertaining to it." Pursuant to the authority thus con-

[16] Compare Chief Justice Marshall's views at the trial of Aaron Burr:

"I can readily conceive that the president might receive a letter which it would be improper to exhibit in public, because of the manifest inconvenience of its exposure. *The occasion for demanding it ought, in such a case, to be very strong, and to be fully shewn to the court before its production could be insisted on.* * * * Such a letter, though it be a private one, seems to partake of the character of an official paper, and to be such as ought not on light ground to be forced into public view." [Italics supplied.] 2 Robertson, *Burr's Trials* (1808) pp. 535–536.

ferred, the Attorney General, in 1939, issued an order which designates as "confidential" all official files, documents, and records in the offices of the Department of Justice, including the Federal Bureau of Investigation." The order forbids disclosure of such files, documents, etc., except in the discretion of the Attorney General or a designated official acting for him, and provides that when a subpoena *duces tecum* for the production of any such files, documents, etc., is served on any employee, he shall decline to produce them unless otherwise expressly directed by the Attorney General.

If the Attorney General's order is within the authority granted by Section 161 and if the section, as implemented by this order, is constitutional, the documents which the district court ordered produced were "privileged" and Rule 34 did not permit an order requiring their promotion. We submit that *Boske* v. *Comingore,* 177 U. S. 459, directly establishes both that Section 161 authorizes the Attorney General's order and that this exercise of the authority granted by Congress is constitutional.

In the *Boske* case, the Commonwealth of Kentucky had instituted a proceeding to ascertain the amount and value of whisky in bonded warehouses owned by the defendants but not listed for taxation, and to enforce state and county taxes

[17] The order is quoted in full, *supra*, pp. 3–4.

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on such whisky. The United States Collector of Internal Revenue declined to file with the state court copies of his official records showing the liquor which the defendants had deposited in, and withdrawn from, bonded warehouses. The Collector was thereupon adjudged in contempt and committed to jail until he should comply with the court's demand. A federal district court released him on writ of habeas corpus, and, on appeal from the order of release, this Court held that the Collector had properly refused to produce his records since the regulations of the Treasury Department forbidding their disclosure were binding and valid.

The Treasury regulation, like Order No. 3229 of the Attorney General, recited that disclosure of such records by a Collector is held to be contrary to public policy and not permitted, and that process issued for their production by a state or federal court should be directed to the Secretary for authentication and transmittal of the documents "unless it should be found that circumstances or conditions exist which makes it necessary to decline, in the interest of the public service, to furnish such a copy."

The Court stated that if these regulations were authorized by the statute, and if the statute were constitutional, the state authorities were without jurisdiction to compel the Collector to violate them. The Court pointed out (177 U. S. 467, 468), that the Secretary was authorized by the statute to

make regulations not inconsistent with law, for the custody, use and preservation of such records, and the Court holds the statute, R. S. 161, to be a valid exercise of congressional power under Article I, Section 8.

Turning to the question of whether the regulation was inconsistent with law, within the meaning of the phrase as used in R. S. 161, the Court stated, "There is certainly no statute which expressly or by necessary implication forbade the adoption of such a regulation. This being the case, we do not perceive upon what ground the regulation in question can be regarded as inconsistent with law * * *" (p. 469).

The Court comments that "reasons of public policy may well have suggested the necessity * * * of not allowing access to the records * * * except as might be directed by the Secretary * * *." The interests of taxpayers as well as the functions of the Treasury Department might be affected adversely if disclosure were not so limited. The Court concludes that "At any rate, the Secretary deemed the regulation in question a wise and proper one, and we cannot perceive that his action was beyond the authority conferred upon him by Congress" (p. 470).

Boske v. *Comingore* has been followed by a series of lower court decisions in similar and related situations.[18] This case differs from it

[18] In *Ex Parte Sackett*, 74 F. 2d 922 (C. A. 9) government files in the possession of a subordinate official were

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only in that the Federal Government is here, and was not there, the moving party. But we shall demonstrate that that difference does not work a difference in result. (See *infra*, pp. 57–63.) Before reaching that question, however, it is helpful to consider such historical and developmental factors as will reveal R. S. 161 in proper perspective.

B. R. S. 161 reflects the constitutional independence of the executive.—The history of R. S. 161 makes it clear that it is considerably more than a provision for routine administration by agency heads in handling their internal housekeeping. Rather, it was intended to be a grant of independent authority, in accordance with and as part of the fabric of the constitutional plan of separation of powers. R. S. 161 stems directly from the original organic acts establishing the executive departments (1 Stat. 28, 49, 65, 68, 553). It is thus one of the cornerstones of the executive branch. It embodies a recognition of

held to be immune from subpoena in a private antitrust action, even though the documents sought were copies of records of the defendant which, it was alleged, the defendant had destroyed. See also *United States* ex rel. *Touhey* v. *Ragen and McSwain* (C. A. 7), decided February 24, 1950; *In re Huttman*, 70 Fed. 699 (D. Kans.); *In re Weeks*, 82 Fed. 729 (D. Vt.); *In re Lamberton*, 124 Fed. 446 (W. D. Ark.); *Stegall* v. *Thurman*, 175 Fed. 813 (N. D. Ga.); *Walling* v. *Comet Carriers*, 3 F. R. D. 442 (S. D. N. Y., 1944); *Meyer* v. *Home Insurance Co.* 127 Wis. 293; *Federal Life Ins. Co.* v. *Holod*, 30 F. Supp. 713 (M. D. Pa.); *Brent* v. *Hagner*, Fed. Cas. No. 1839 (C. C. D. C., 1836).

the independence of the executive: Under the Continental Congress, the relationship between legislature and executive had been modeled on the British system. The executive departments were, in effect, answerable to the legislature, and could be called on for an accounting. A resolution of the Continental Congress creating the Department of Foreign Affairs, whose head was appointed by and held office at the pleasure of Congress, provided:

> That the books, records and other papers of the United States, that relate to this department, be committed to his custody, to which, and all other papers of his office, any member of Congress shall have access: provided that no copy shall be taken of matters of a secret nature without the special leave of Congress. [*Journals of the Continental Congress,* Vol. XXII (1782), pp. 87–92.]

The complete change wrought by the Constitution in establishing the three independent branches (The Federalist, Nos. XLVII, XLVIII) was reflected in R. S. 161. See Wolkinson, *Demands of Congressional Committees for Executive Papers* (1949), 10 Fed. Bar. Journal 319, 328–330. The privilege which it confers derives from the same constitutional source as, and closely parallels, the executive privilege which has consistently and successfully been asserted in response to Congressional attempts to require production by the

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executive branch, often of the very type of documents involved in this case.[19]

During the administration of President Hayes, for example, the House Judiciary Committee, under the chairmanship of Benjamin F. Butler, pointed out that all resolutions directed to the President relating to the production of records properly would contain the clause "if in his judgment not inconsistent with the public interest." H. Rep. No. 141, 45th Cong., 3d Sess., p. 3. And the committee continued (*id.* at pp. 3 and 4):

> * * * whenever the President has returned (as sometimes he has) that, in his judgment, it was not consistent with the public interest to give the House such information, no further proceedings have ever been taken to compel the production of such information Indeed, upon principle, it would seem that this must be so. The Executive is as independent of either house of Congress as either house of Congress is independent of him, and they cannot call for the records of his action or the action of his officers against his consent, any more than he can call for any of the journals and records of the House or Senate.[20]

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[19] See Wolkinson, *Demands of Congressional Committees for Executive Papers* (1949) 10 Fed. Bar J. 103–150, 223–259, 319–350.

[20] For a recent instance of Congressional assertion of independence as against the judiciary, see 96 Cong. Rec. (daily ed.) 589–590 (January 18, 1950): H. Res. 427, 81st Cong., 2d

The decision as to whether there should be compliance with a particular request was the executive's, the committee stated:

> Somebody must judge upon this point. It clearly cannot be the House or its committee, because they cannot know the importance of having the doings of the executive department kept secret. The head of the executive department, therefore, must be the judge in such case and decide it upon his own responsibility to the people, and to the House, upon a case of impeachment brought against him for so doing, if his acts are causeless, malicious, willfully wrong, or to the detriment of the public interests.

There are many other instances of successful assertion of the executive privilege, *vis à vis* Congress, including one which gave rise to a great Congressional debate, occupying the Senate for almost two weeks, during President Cleveland's first administration. 17 Cong. Rec. 2211–2814. See Sen. Misc. Doc., Vol. 7, 52d Cong., 2d Sess., pp. 235–243; 8 Richardson, *Messages and Papers of the Presidents,* pp. 375–383; 17 Cong. Rec.

Sess.: "* * * *Resolved*, That by the privileges of this House no evidence of a documentary character under the control and in the possession of the House of Representatives can, by the mandate of process of the ordinary courts of justice, be taken from such control or possession but by its permission * * *." 96 Cong. Rec. (daily ed.) 1428, 1429 (Feb. 2, 1950); see on subsequent subpoena, H. Res. 465, 96 Cong. Rec. (daily ed.) 1727 (Feb. 8, 1950); H. Res. 469, 96 Cong. Rec. (daily ed.) 1803, 1804 (Feb. 13, 1950).

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4095. And while there may very well be differences in the force of the privilege when it touches on the interest of parties to a judicial proceeding,[21] the executive's relations with Congress, if not controlling, are certainly relevant. For before a balance can be struck between claimed individual rights and an executive privilege, the weight to be given the privilege must be ascertained by reference to the history of its assertions and the reaction to those assertions.

Extended reference has already been made to this Court's decision in *Boske* v. *Comingore,* 177 U. S. 459, and the cases in which it has been followed. But, even before that decision, in *Marbury* v. *Madison,* 1 Cranch 137, Attorney General Lin-

[21] But see the views of Senator Jackson, later to become an associate justice of this Court (17 Cong. Rec. 2623):

"Sir, has this body, has the Congress of the United States any more authority over papers in the Executive Departments of this Government than the co-ordinate independent branch of the Government—the judiciary? The judicial department of this Government has as much power and authority over all papers in the hands of the Executive or in any Department as the entire Congress has. When the rights of individuals, affecting their life, liberty, or property, are pending before the courts, the judicial department has as much power over papers as the Senate or the whole Congress; and yet it has been universally recognized from the very foundation of this Government that the judicial department of the Government can not call for papers and procure them either from the President or the head of an Executive Department at its own will, but that the discretion rests with the Executive and with the Departments how far and to what extent they will produce those papers."

coln, appearing as a witness, objected to answering certain questions concerning the disposition of Marbury's commission while he was Secretary of State. "On the one hand, he respected the jurisdiction of this court, and on the other, he felt himself bound to maintain the rights of the executive" (1 Cranch 143). The Court said, "they had no doubt he ought to answer. There was nothing confidential required to be disclosed. If there had been, he was not obliged to answer it; and if he thought that anything was communicated to him in confidence, he was not bound to disclose it * * *" (1 Cranch 144). Lincoln subsequently answered substantially all of the questions (1 Cranch 145). When sitting on Burr's trial, Chief Justice Marshall issued a subpoena to President Jefferson for the production of a letter sent by General Wilkinson to the President, which Burr affirmed contained information vital to his defense. Jefferson ignored the subpoena and directed the United States Attorney to produce only such portions of the letter as he deemed not to be confidential (1 Robertson, *Burr's Trials* (1808) pp. 177, 180, 186–188; 1 Dillon, *Marshall: Life, Character, Judicial Services* (1903) pp. XLVI–XLIX; 9 Ford, *Writings of Thomas Jefferson* (1898) pp. 55–57 (62)). In both cases, the Court avoided treating the issue as a test of power with the executive.[22]

[22] "In no case of this kind would a court be required to proceed against the president, as against an ordinary individ-

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Every Attorney General considering the problem has been of the opinion that information disclosure of which would be detrimental to the public interest is privileged, and that the determination of the executive is conclusive. 11 Ops. A. G. 137, 142–143; 15 Ops. A. G. 378; 16 Ops. A. G. 24; 25 Ops. A. G. 326. Attorney General Jackson has said (40 Ops. A. G. 45, 49):

> This discretion in the executive branch has been upheld and respected by the judiciary. The courts have repeatedly held that they will not and cannot require the executive to produce such papers when in the opinion of the executive their production is contrary to the public interests. The courts have also held that the question whether the production of the papers would be against the public interest is one for the executive and not for the courts to determine. *Marbury* v. *Madison,* 1 Cranch 137, 169; *Totten* v. *United States,* 92 U. S. 105; *Kilbourn* v. *Thompson,* 103 U. S. 168, 190; *Vogel* v. *Gruaz,* 110 U. S. 311; *In re Quarles and Butler,* 158 U. S. 532; *Boske* v. *Comingore,* 177 U. S. 459; *In re Huttman,* 70 Fed. 699; *In re Lamberton,* 124 Fed. 446; *In re Valecia Condensed Milk Co.,* 240 Fed. 310; *Elrod* v. *Moss,* 278 Fed. 123; *Arnstein* v. *United States,* 296 Fed. 946; *Gray* v. *Pentland,* 2 Sergeant & Rawle's (Pa.) 23, 28; *Thompson* v. *German Valley R. Co.,* 22

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ual. The objections to such a course are so strong and so obvious, that all must acknowledge them." Chief Justice Marshall in 2 Robertson, *op. cit. supra,* p. 536.

N. J. Equity 111; *Worthington* v. *Scribner*, 109 Mass. 487; *Appeal of Hartranft*, 85 Pa. 433, 445; 2 *Burr Trials*, 533–536; see also 25 Op. A. G. 326).[23]

The privileged nature of information acquired by public officials has been recognized by the states in a variety of statutes protecting the confidence of communications or government documents.[24] Some fourteen states have enacted statutes providing in general terms that a public officer cannot be examined as to communications made to him in official confidence, when the public interest will suffer by disclosure.[25] In addition, many

[23] Accord: American Law Institute, *Model Code of Evidence* (1942), Rule 228; 1 Greenleaf, *Evidence* (1899 Ed.), Sec. 251; 3 Jones, *Evidence* (4th Ed., 1938), Sec. 762. Wigmore has been of the contrary view (Wigmore on *Evidence* (1940), Sec. 2378a) since 1905 (1905 Ed., Sec. 2375), although he recognizes a privilege for communications by informer and a limited class of state secrets, not clearly defined.

[24] Aside from statutes, the courts of the several states have long recognized the privileged nature of such data. Early cases give effect to the privilege of communications from informants, and to other limitations upon the attempt to obtain evidence from state officials by court process. See notes 34 and 38, *infra*, pp. 50 and 54.

[25] Calif. Code Civ. Prod. Ann. § 1881 (5) (1941); Idaho Code Ann. § 9–203 (1948); Code of Iowa § 622.11 (1946); Minn. Stat. Ann. § 595.02 (5) (West 1947); Mont. Rev. Code Ann. § 10536 (5) (1935); Neb. Rev. Stat. § 25–1208 (1948); Nev. Comp. Laws Ann. § 8975 (1929); N. D. Rev. Code § 31–0106 (1943); Ore. Comp. Laws Ann. § 3–104 (5) (1940); S. D. Code § 36.0101 (5) (1939); Utah Code § 104–49–3 (1943); Wash. Rev. Stat. Ann. § 1214 (5) (1932); and see Colo. Stat. Ann. Ch. 177 § 9 (1949); Ga. Code Ann. § 38–1102 (1937).

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statutes dealing with narrower classifications of official information have been enacted; among these are statutes relating to police reports of highway accidents, tax returns, reports submitted in compliance with banking laws, health reports, and many others.[26] The validity of such legislation forbidding disclosure of information by public officials has been upheld by the state courts.[27] The variance in wording and coverage of particular statutes prevents any generalization as to the scope and effect of such legislation. It may be said, however, that the widespread pattern of legislation imposing restrictions upon free disclosure of this type of information indicates an

[26] For a general survey and discussion of state legislation, see Sanford, *Evidentiary Privileges against the Production of Data Within the Control of Executive Departments*, 3 Vanderbilt L. Rev. 73, 82 (1949); Note, 165 A. L. R. 1302.

[27] *Appl. of Manufacturers Trust Co.*, 269 App. Div. 108, 53 N. Y. S. 2d 923 (1945); *Oklahoma Tax. Comm.* v. *Clendinning*, 193 Okla. 271, 143 P. 2d 143 (1943); *Hickok* v. *Margolis*, 221 Minn. 480, 22 N. W. 2d 850 (1946); *Fleming* v. *Superior Court*, 196 Cal. 344, 238 Pac. 88 (1925); *Thaden* v. *Bagan*, 139 Minn. 46, 155 N. W. 864 (1917); *Peden* v. *Peden's Adm'r*, 121 Va. 147, 92 S. E. 984 (1917); *In re Herrnstein*, 20 Ohio Ops. 405, 6 Ohio Supp. 260 (1941); *Maryland Casualty Co.* v. *Clintwood Bank*, 155 Va. 181, 154 S. E. 492 (1930); *Samish* v. *Superior Court*, 28 Cal. App. 2d 685, 83 P. 2d 305 (1938); *Leave* v. *Boston El. Ry. Co.*, 306 Mass. 391, 28 N. E. 2d 483 (1940); *Dwelly* v. *McReynolds*, 6 Cal. 2d 128, 56 P. 2d 1232 (1936); *Simonsen* v. *Barth*, 64 Mont. 95, 208 P. 938 (1922). Contra: *In re French*, 315 Mo. 75, 285 S. W. 513 (1926).

accepted public policy and a recognition of the principles of the earlier court decisions and of the constitutional mandate that the executive be independent.

Nor can one ignore British judgments in the field of executive privilege. For while their constitutional system differs from our tripartite organization, they too have, as much as do we, the conflict between the demands of litigants and the necessities of executive privacy. There is available to us a most authoritative recent decision in which the problem has been thoroughly canvassed—the decision of the House of Lords in *Duncan* v. *Cammell, Laird & Co.* (1942) A. C. 624.[28] The action arose out of the sinking of the submarine Thetis, and was brought by representatives of deceased seamen against the builders. Discovery was sought of the plans, contracts for construction, and other documents. The First Lord of the Admiralty filed an affidavit, claiming privilege from disclosure on the ground that it would be injurious to the public interest. As the Lord Chancellor put it:

[28] "The importance of *Duncan* v. *Cammell, Laird & Co.* * * * is marked by the fact that seven members of the House of Lords sat to hear the appeal. Moreover, the unusual course was followed of delivering only a single judgment which was prepared by the Lord Chancellor after 'consultation with and contribution from' the other learned Lords" (58 Law Quarterly Rev. 436). The decision also disapproves *Robinson* v. *State of South Australia* (1931) A. C. 704).

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> My Lords, the question to be determined in this appeal is as to the circumstances in which it may be validly claimed on behalf of the Crown that documents, the production of which is demanded by regular process in a civil action, should not be produced on the ground that it would be contrary to the public interest to produce them, and as to the proper procedure to be followed if this claim is to be made good. This question is of high constitutional importance, for it involves a claim by the executive to restrict the material which might otherwise be available for the tribunal which is trying the case. This material one party, at least, to the litigation may desire in his own interest to make available, and without it, in some cases, equal justice may be prejudiced. The question may arise, as in the present instance, in an action between private parties, but it may also arise in a case where the Crown itself, or the Crown's representative, is a party to the suit and declines to produce a document or objects to the production of a document by the other side.

After reviewing precedents and pointing out that the rule in criminal cases might be different, the opinion states:

> * * * The principle to be applied in every case is that documents otherwise relevant and liable to production must not be produced if the public interest requires

> that they should be withheld. This test may be found to be satisfied either (a) by having regard to the contents of the particular document, or (b) by the fact that the document belongs to a class which, on grounds of public interest, must as a class be withheld from production.

The Lord Chancellor then considers the manner in which the privilege should be raised and, a key issue in the case, whether the determination of privilege is to be made by the executive or by the court:

> Two further matters remain to be considered. First, what is the proper form in which objection should be taken that the production of a document would be contrary to the public interest? And secondly, when this objection is taken in proper form, should it be treated by the court as conclusive, or are there circumstances in which the judge should himself look at the documents before ruling as to their production?

He concludes that the privilege should be claimed by the head of the executive department:

> The essential matter is that the decision to object should be taken by the minister who is the political head of the department, and that he should have seen and considered the contents of the documents and himself have formed the view that on grounds of public interest they ought not to be produced, either because of their

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> actual contents or because of the class of documents, e. g., departmental minutes, to which they belong.

And, on the second question, after reviewing the cases, and quoting among others the statement of Lord Kinnear in *Admiralty Commissioners* v. *Aberdeen Steam Trawling & Fishing Co.* (1909) Sess. Cas. 335—"A department of Government, to which the exigencies of the public service are known as they cannot be known to the Court, must, in my judgment, determine a question of this kind for itself * * *", the Lord Chancellor states that the executive determination of privilege is conclusive on the court, pointing out, also

> In many cases there is a further reason why the court should not ask to see the documents, for where the Crown is a party to the litigation, this would amount to communicating with one party to the exclusion of the other, and it is a first principle of justice that the judge should have no dealings on the matter in hand with one litigant save in the presence of and to the equal knowledge of the other.[29]

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[29] "Nor can courts sit *in camera* in order to be taken into executive confidences" (*Chicago & Southern Air Lines* v. *Waterman S. S. Corp.*, 333 U. S. 103, 111). Compare *Rex* v. *Davies* (1945) 1 K. B. 435, 442 (Humphreys, J.) "* * * I think it is a fallacy to say or to assume that the presiding judge is a person who cannot be affected by outside information. He is a human being, and * * * it is embarrassing to a judge that he should be informed of matters which he would much rather not hear and which make it

The opinion discusses the basis on which the executive determination should be made.[30] It then outlines the consequences of the executive decision, made after due consideration:

> When these conditions are satisfied and the minister feels it is his duty to deny access to material which would otherwise be available, there is no question but that the

much more difficult for him to do his duty * * *" (Oliver, J.). "* * * the judge who, after hearing the statements, has to pronounce sentence, may, quite unconsciously, have his judgment influenced by matters which he has no right to consider. * * *"

[30] "In this connection, I do not think it is out of place to indicate the sort of grounds which would not afford to the minister adequate justification for objecting to production. It is not a sufficient ground that the documents are 'State documents' or 'official' or are marked 'confidential.' It would not be a good ground that, if they were produced, the consequences might involve the department or the government in parliamentary discussion or in public criticism, or might necessitate the attendance as witnesses or otherwise of officials who have pressing duties elsewhere. Neither would it be a good ground that production might tend to expose a want of efficiency in the administration or tend to lay the department open to claims for compensation. In a word, it is not enough that the minister of the department does not want to have the documents produced. The minister, in deciding whether it is his duty to object, should bear these considerations in mind, for he ought not to take the responsibility of withholding production except in cases where the public interest would otherwise be damnified; for example, where disclosure would be injurious to national defence, or to good diplomatic relations, or where the practice of keeping a class of documents secret is necessary for the proper functioning of the public service" (1942 A. C. at 642).

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> public interest must be preferred to any private consideration. * * * After all, the public interest is also the interest of every subject of the realm, and while, in these exceptional cases, the private citizen may seem to be denied what is to his immediate advantage, he, like the rest of us, would suffer if the needs of protecting the interests of the country as a whole were not ranked as a prior obligation.

This decision occasioned considerable comment, both pro[31] and con,[32] but when the Crown Proceedings Act, 1947, 10 and 11 Geo. 6, C. 44, s28, authorized discovery against the Crown for the first time, it exempted any document which would, in the opinion of a Minister, be injurious to the public interest to disclose, and specifically provided for the right of the Minister to deny the very existence of such a document.

The indications from this Court's opinion in *Boske* v. *Comingore,* 177 U. S. 459, seem to be that R. S. 161 reflects the executive's constitutional independence of the judiciary as much as do these provisions of the Crown Proceedings Act.[33]

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[31] *Production of Documents: The State and the Individual* (1942) 193 L. T. 224; 21 Can. Bar. Rev. 51: 58 L. Q. R. 31.

[32] 58 L. Q. R. 436; 59 L. Q. R. 102; 20 Can. Bar. Rev. 805.

[33] "* * * Such order ought not to be made against the Executive of the state, because it might bring the Executive in conflict with the judiciary. If the Executive thinks he ought to testify, in compliance with the opinion of the court, he will do it without an order; if he thinks it to be his official

C. *The right to keep confidential documents of the kind here involved gives effect to sound considerations of public policy.*—The privilege granted to the executive by R. S. 161 reflects an established public policy composed of a complex of elements. Among these is the interest in efficient administration of the government free from interference;[34] secrecy of matters of foreign policy, security, and national defense;[35] protection

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duty, in protecting the right and dignity of his office, he will not comply even if directed by an order * * *" (*Thompson* v. *German Valley Railroad Co.*, 22 N. J. Eq. 111, 114 (1871).

[34] In libel actions based on communications to government officials relating to the business of their office, the documents "are privileged from disclosure, on the ground of public policy, and the production will not be compelled by courts of law or equity" (*Gardner* v. *Anderson*, Fed. Cas. No. 5220 (C. C. D. Md., 1876); *Gray* v. *Pentland*, 2 Serg. & Rawles 23 (Pa., 1815); *Harwood* v. *McMurtry*, 22 F. Supp. 572 (W. D. Ky.) and cf. note 18, *supra*, p. 34).

[35] Cf. President Truman's directive of March 13, 1948, 13 F. R. 1359. In *Totten* v. *United States*, 92 U. S. 105, a contract for espionage made with President Lincoln was held to be of its nature so confidential in the public interest that suit would not lie on it. Similarly, in a contract action between private parties, military secrets are privileged in the public interest, even if privilege is not claimed by a party (*Firth Sterling Steel Co.* v. *Bethlehem Steel Co.*, 199 Fed. 353 (E. D. Pa.); *In re Grove*, 180 Fed. 62 (C. A. 3); *Pollen* v. *Ford Instrument Co.*, 26 F. Supp. 583 (E. D. N. Y.)).

The Attorney General's claim of privilege for the F. B. I. reports in the public interest is at least in part based on the needs of national security. Under the Attorney General, the F. B. I. is the branch of the Government primarily responsible for the internal security of the nation. Complete

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of communications by informants to officials; shielding of prospective witnesses from undue pretrial influences, particularly in criminal cases;

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confidence of informants that they will be protected is of the highest importance to effective operation in this field. Secrecy of methods, personnel, sources and techniques is necessarily closely guarded. Thus *Duncan* v. *Cammell, Laird & Co.* (1942) A. C. 624, 635, particularly recognizes that "the public interest requires a particular class of communications with, or within, a public department to be protected from production on the ground that the candour and completeness of such communications might be prejudiced if they were ever liable to be disclosed in subsequent litigation rather than on the contents of the particular document itself." In *United States* v. *Haugen*, 58 F. Supp. 436 (E. D. Wash.) affirmed on other grounds 153 F. 2d 850 (C. A. 9), the defendant was charged with counterfeiting obligations of the United States, consisting of meal tickets for the Commissary of the Hanford Engineering Works. At that time, the nature of the business of the Hanford Engineering Works was the nation's most closely guarded secret. In order to convict the accused, it was necessary to prove that the Commissary was an agency of the United States. The Government claimed that the contract between the United States and DuPont, for operation of the plant, was privileged, but offered to introduce secondary evidence of those portions of the contract establishing the status of the Commissary. The district court permitted secondary evidence to be introduced on this point, by the testimony of a lawyer who had read the original contract (see 153 F. 2d 852), and Haugen was convicted. There can be little question who was better qualified to determine whether, in 1944, a contract for the production of fissionable material was privileged—the district judge or the physicists and informed military men in charge of the project. And, even if the judge possessed adequate technical background to appreciate the enormity of the secret, had the court passed on the document it would, at the least, have added the judge, if not the clerk, to the select list of those having knowledge of a national secret.

as well as the constitutional doctrine of the independent functions of executive and judiciary with which the preceding subsection of this brief was concerned.[36]

Communications may take the form of letters by informants to the law enforcement agency or oral statements recorded in the reports of investigatory agents. But, in whatever form, free communication with private citizens is vital to the enforcement of the antitrust laws. Without the cooperation of the public, many violations would not come to the attention of the Department of Justice, or could not be reached for lack of proof. The confidence of such informants in the law-enforcement arm of the government is based in large part on the knowledge that their identity and information will be kept confidential and not made accessible to those who might wish to retaliate against the informer. Were it to become general practice, at the outset of an antitrust suit, to disclose all such informants, many small businessmen, employees or acquaintances

[36] Constitutional doctrines derive in part, of course, from considerations of public policy. And so, in a sense, this subsection of the Argument is merely an expansion of that immediately preceding. The division between the two is justified only by the fact that the preceding subsection dealt largely with what may be called institutional reasons for the executive privilege; i. e., the necessary independence of the legislative, judicial and executive branches one from the other as part of a tripartite system of checks and balances—while this subsection deals with *other* policy considerations.

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would hesitate to risk the financial or social vengeance of those complained against.

But the interest of the government is much broader than the problem of antitrust violations alone. The Attorney General, through the Department of Justice with its investigative arm, has responsibility for all federal law enforcement, involving crimes and civil infractions of the widest scope and variety. The credit of the Department of Justice and the F. B. I. would be damaged seriously if discovery of informants' identity and the information supplied were generally permitted, with grievous consequences going far beyond the confines of this case. In some circles, (e. g., petty thieves, racketeers, tax evaders, as well as espionage agents and other more notorious law violators) the fate of known informants is swifter and more obvious than of those who merely criticize the business practices of an established corporation. When it is known that conversations with the F. B. I. are quite likely to become matters of court record and subsequent publication, those conversations will be less frequent. Such news travels fast among those whose security and peace of mind depend upon maintenance of their anonymity.

The importance of protecting the anonymity of informants is thus so great that it has been given recognition, not only as one of the reasons supporting the privilege of the executive not to

make public its files,[37] but also, separately, as an independent ground for exclusion. Thus, this Court has held that the identity of the informant and the nature of the information furnished "cannot be compelled without the assent of the government," *In re Quarles and Butler,* 158 U. S. 532, 536, unless it is essential to the defense. *Scher* v. *United States,* 305 U. S. 251, 254.[38]

Distinct from the protection of informants but related to the problem of keeping open the chan-

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[37] In *Vogel* v. *Gruaz*, 110 U. S. 311, 316, this Court said: "* * * it is the duty of every citizen to communicate to his government any information which he has of the commission of an offence against its laws; and * * * a court of justice will not compel or allow such information to be disclosed, either by the subordinate officer to whom it is given, by the informer himself, or by any other person, without the permission of the government, the evidence being excluded not for the protection of the witness or of the party in the particular case, but upon general grounds of public policy, because of the confidential nature of such communications."

[38] Washington, Cir. J., in *United States* v. *Moses,* Fed. Cas. No. 15825 (C. C. E. D. Pa., 1827), "such a disclosure can be of no importance to the defence in this case, and may be highly prejudicial to the public in the administration of justice, by deterring persons from making similar disclosures of crimes which they know to have been committed." Accord: *Elrod* v. *Moss*, 278 Fed. 123 (C. A. 4); *Arnstein* v. *United States*, 296 Fed. 946 (C. A. D. C.), certiorari denied, 264 U. S. 595; *Segurola* v. *United States*, 16 F. 2d 563 (C. A. 1), affirmed, 275 U. S. 106; *United States* v. *Li Fat Tong*, 152 F. 2d 650 (C. A. 2); *Worthington* v. *Scribner*, 109 Mass. 487; *People* v. *Laird*, 102 Mich. 135, 60 N. W. 457; *State* v. *Soper*, 16 Me. 293; *Maine* v. *Fortin*, 106 Me. 382, 76 A. 896.

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nels of communication with the government, is the protection of the innocent from the publication of information in the hands of the government which may be entirely false or which, being fragmentary, may produce a distorted picture. The danger arises because in many investigations, in the first instance, information of any type is sought—hearsay and gossip, the true and the false, the remote and the contingent. Out of such undigested "raw material," the investigator and lawyer seek to discover the truth and to assemble evidence acceptable by legal standards. The government cannot afford to refuse the trivial and the malicious, for sometimes these lead to the important fact. Yet, by accepting them as a necessary part of an investigation, by no stretch of the imagination is credence given to them. Exposure of such trivia and falsehoods by the district court may work the gravest injury and injustice to those named. The Attorney General has consistently recognized his obligation to protect against publication of unverified accusations. It is all too apparent that later attempted exoneration seldom washes out the taint of the original unfounded accusation.

The determination of what documents should not be disclosed in the public interest is a determination necessarily within the discretion and distinctive knowledge of the executive branch. It is the executive who day in and day out is responsible for the administration of the laws and

for the national security, and who is able to evaluate the importance of the particular piece of information sought in relation to an entire course of government policy or action. To the extent that the public interest is at stake in these circumstances, the public interest necessarily requires that the determination of what is privileged be made by the agency responsible for the national program for the protection of which the privilege is asserted. To divorce discretion from responsibility is in itself a denial of the public interest.

The balance of conflicting public interests involves a question "of high constitutional importance," *Duncan* v. *Cammell, Laird* (*supra*, p. 629), reflecting the relationship of the executive and the judiciary; it is peculiarly a problem which "should inspire caution in those intrusted with its administration to confine themselves within their respective constitutional spheres, avoiding in the exercise of the powers of one department to encroach upon another."[39] It is the executive who is charged with the continuing administration of the laws and the maintenance of national security, and has the background information and technical knowledge necessary to evaluate what must not be disclosed in the public interest. In a government of separate powers, weight must be accorded to the judgment of the executive in a

[39] Washington's Farewell Address, Richardson, *Messages and Papers of the Presidents*, Vol I, p. 219.

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function primarily within his discretion, else his function is undermined.[40]

D. *The executive privilege is not abandoned when the Government brings suit.*—When the Federal Government is the moving party to an action, the executive privilege is no different, by

[40] "In other words if, from such analogy, we once begin to shift the supreme executive power, from him upon whom the constitution has conferred it, to the judiciary, we may as well do the work thoroughly and constitute the courts the absolute guardians and directors of all governmental functions whatever. If, however, this cannot be done, we had better not take the first step in that direction. We had better at the outstart recognise the fact, that the executive department is a co-ordinate branch of the government, with power to judge what should or should not be done, within its own department, and what of its own doings and communications should or should not be kept secret, and that with it, in the exercise of these constitutional powers, the courts have no more right to interfere, than has the executive, under like conditions, to interfere with the courts.

* * * * *

* * * the President of the United States, the governors of the several states and their cabinet officers, are not bound to produce papers or disclose information committed to them, in a judicial inquiry, when, *in their own judgment*, the disclosure would, on public grounds, be inexpedient: 1 Greenf. on Ev., § 251; 1 Whart. Law of Ev., § 604. Thus, the question of the expediency or inexpediency of the production of the required evidence is referred, not to the judgment of the court before which the action is trying, but of the officer who has that evidence in his possession * * * as judicial inquiry must always be public, the preliminary examination must give to the document that very publicity which it might be important to prevent" * * * (*Appeal of Hartranft* (1877) 85 Pa. 433, 445, 447).

virtue of that fact, than when, as in *Boske* v. *Comingore,* 177 U. S. 459, the action involved is between a state and a private individual and the state is seeking disclosure. The public interest in nondisclosure is no less in such instances, and individual justice is no more at stake than in actions brought by a state, or between private parties. Only a superficial analysis of the underlying problem could lead to the assertion that when the government submits to court process it must withhold nothing. Such a rule-of-thumb would have the consequence of forcing the executive to choose between faithfully executing the laws and jeopardizing the national interest in matters deemed confidential, a choice that would necessarily result in a complete absence of law enforcement and abandonment of the Government's legal rights in some areas and some circumstances, or, at the least, in the dismissal of indictments voted by the grand jury and of civil suits in progress.[41] The inaptness of the fiction

[41] When the United States is defendant, the requirement that it disclose information upon generalized motions for discovery upon penalty of default judgment would force it to choose between the national interest protected and the payment of government funds to plaintiffs able to set forth a prima facie cause of action, who may well not be entitled thereto. It would be a strange result if the Federal Rules authorized greater rights before trial than were granted on the merits (Cf. *Totten* v. *United States,* 92 U. S. 105; *Bank Line* v. *United States,* 68 F. Supp. 587, prohibition denied, 163 F. 2d 133, rehearing, 76 F. Supp. 801. The dilemma would become even more pointed in a mandamus action.

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of waiver is particularly apparent when, as here, the Attorney General, appearing for the United States, has affirmatively claimed privilege.[42]

In a series of admiralty actions against, or brought by, the United States in which discovery was sought of the record of a Naval Board of Inquiry, the privilege, based on the need of free and open discussion within the service, was upheld (*Pacific-Atlantic S. S. Co.* v. *United States*, 175 F. 2d 632 (C. A. 4, certiorari denied, 338 U. S. 868); *Anglo-Saxon Petroleum Co.* v. *United States*, 78 F. Supp. 62 (D. Mass.); *The Wright-Papoose*, 2 F. Supp. 43 (E. D. N. Y.); *State of Maryland to use of Daisy Kent* v. *United States*, 1947 A. M. C. 1336 (D. Md., 1947); compare *Alltmont* v. *United States*, 177 F. 2d 971 (C. A. 3)). In *Bank Line Limited* v. *United States*, 68 F. Supp. 587 (S. D. N. Y.), the district court granted discovery. The Government filed a petition for a writ of prohibition, which the court of appeals ruled to be inappropriate, but the majority opinion recommended that the district court consider *Duncan* v. *Cammell Laird & Co.* (1942) A. C. 624 and *Boske* v. *Comingore* in reaching its decision. 163 F. 2d 133. The district court did so but again granted discovery (76 F. Supp. 801). The case was subsequently settled without disclosure by the government. As to civil suits in which the government was plaintiff, discovery before trial against the United States was denied in the following antitrust actions: *United States* v. *Deere and Co.* (D. Minn., 1949) C. C. H. Trade Reg. Reporter, Par. 62, 572; *United States* v. *The Lorain Journal Co., et al.* (N. D. Ohio, E. D.) decided Feb. 15, 1950; see *United States* v. *Kohler Co.*, 13 Fed. Rules Serv. 33.333 (E. D. Pa.); *United States* v. *Schine Chain Theatres, Inc.*, 4 F. R. D. 108 (W. D. N. Y.). The following cases involving enforcement of the Fair Labor Standards Act also bear on the present problem: *Walling* v. *Comet Carriers*, 3 F. R. D. 442 (S. D. N. Y.); but cf. *Walling* v. *Richmond Screw Anchor Co.*, 4 F. R. D. 265 (E. D. N. Y.).

[42] The particular subordinate official who appears in court is not personally responsible for the government's refusal to disclose information. It is not his to disclose. Only the head of the department may direct disclosure,

When, as in this case, the Government has brought an action to enforce a regulatory and criminal statute there is even less reason for the application of a doctrine of waiver or abandonment of its privilege. Whatever may be said for requiring the Government to abide by the same procedural standards as private parties when the Government's interest is similar to that of a private litigant, there is an additional public interest involved when it seeks to prevent violation of a criminal statute by injunctive process. In such a case, the Government is no mere supplicant. It is the duty of Government to enforce the laws and it would be a curious and dangerous consequence if that duty could be exercised only at the price of abandonment of the public interest in non-disclosure of confidential information.

It does not follow that the executive privilege is unqualified or unlimited. But whatever limitations or qualifications there may be cannot sensi-

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R. S. 161; *Duncan* v. *Cammell Laird & Co.*, *supra;* and when a subordinate seeks to dispose of government documents contrary to instructions of his superior, he has ceased to have any legal authority to do so. "The documents, although physically in the possession of the witness, are in law in the custody of the Attorney General * * *." *Ex parte Sackett*, 74 F. 2d 922, 924 (C. A. 9).

It is likewise irrelevant that the information sought is in the possession of the particular Government agency responsible for the "administration of those laws for whose violation the accused has been indicted." But cf. *United States* v. *Grayson*, 166 F. 2d 863, 870 (C. A. 2). When the United States is the privileged party to the action, its several agents have no independent status.

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bly be derived from a mechanical doctrine of waiver. It may be that if the Government, in a criminal case, possesses information which is so vital to the defense that its production might exculpate the defendant, due process would require that that information be divulged at trial if the prosecution is to be pressed[43] (Cf. *Mooney* v. *Holohan*, 294 U. S. 103). As Lord Chief Justice Eyre stated in the *Trial of Thomas Hardy*, 24 State Trials (1794), 199, 808: "if it can be made appear that really and truly it is necessary to the investigation of the truth of the case that the name of the person should be disclosed,

[43] There is no necessity for anticipating the problems that might arise in this connection. It is sufficient here to point to various rulings in this field without discussing the correctness of the ruling in any partcular case. *United States* v. *Andolschek*, 142 F. 2d 503 (C. A. 2) (the Treasury Department was required to produce reports prepared by the accused themselves, relating to their dealings with persons from whom they were charged with taking bribes); *United States* v. *Krulewitch*, 145 F. 2d 76 (C. A. 2); appealed following retrial, 167 F. 2d 943, and reversed on other grounds, 336 U. S. 440 (signed statement directly impeaching government witness); *United States* v. *Beekman*, 155 F. 2d 580 (C. A. 2) (OPA records disclosing previous disciplining of government witnesses); *United States* v. *Grayson*, 166 F. 2d 863 (C. A. 2).

The decision is often a difficult one: "The most that could be said of their harmful effect, if any, if they be exposed, is that they would produce irritations and perhaps render nugatory efforts of our Intelligence Service on particular inquiries and maybe endanger individual lives." Interlocutory opinion of the court in *United States* v. *Coplon* (1949), Criminal No. 381–49, District Court of the United States for the District of Columbia.

I should be very unwilling to stop it * * *." But, in such a case, the reason for compelling disclosure would be that, in the scales of justice, the defendant's need outweighs the public interest in maintaining the confidential nature of governmental papers. Disclosure would be directed, not because the Government had waived its privilege against production, but because due process requires a tempering of the absolutism of the privilege.

But even such a limitation on the executive privilege would not be likely to be applicable to discovery procedure; it could be invoked only at trial when the issues were firmly drawn and witnesses had testified, and upon a convincing showing of the urgent necessity to the defense of particularly identified evidence. There is a wide gulf between subpoenaing evidence that will contradict in specific particulars the case that has been put in by the prosecution, and an indiscriminate attempt to strip the Government's files before trial. Indeed, the Rules of Criminal Procedure are careful to guard against this type of raid. Rule 16 limits pre-trial discovery to mate-

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"The interest of the state in criminal prosecutions "is that accused parties shall be acquitted unless upon all the facts they are seen to be guilty; and if there shall be in the possession of any of its officers information that can legitimately tend to overthrow the case made for the prosecution, or to show that it is unworthy of credence, the defense should be given the benefit of it" (Cooley, C. J. in *People* v. *Davis*, 52 Mich. 569, 573–574, 18 N. W. 362 (1884)).

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rials obtained from the defendant or obtained from others by seizure or by process. And even at trial, production will be required only where the defendant can demonstrate the vital relevance of specifically identified documents.[45]

E. *The district court improperly refused to honor the executive privilege under the circumstances of this case.*—We may concede, *arguendo* then, that in some limited circumstances which we are not here called upon to delineate, the executive privilege must be accommodated to countervailing claims demanding consideration. But there is nothing in the circumstances of this case which justifies the application of anything but an absolute privilege of refusal to disclose Government papers. The defendants in a civil antitrust suit should not be armed at the outset with the Government's files but should, at the least, be required to await trial and demonstrate the need for such information in the light of a concretely developed factual presentation. Appellees here

[45] *United States* v. *Cohen*, 145 F. 2d 82 (C. A. 2), certiorari denied, 323 U. S. 799 (statements to F. B. I. not required to be produced when they had no impeaching value); *United States* v. *Ebeling*, 146 F. 2d 254 (C. A. 2) (would not tend to exculpate the defendant); *United States* v. *De Normand*, 149 F. 2d 622 (C. A. 2), certiorari denied, 326 U. S. 756, rehearing denied, 326 U. S. 808, 811, 327 U. S. 816 (minor contradictions of unimportant testimony); *United States* v. *Simonds*, 148 F. 2d 177 (C. A. 2); *United States* v. *M. Kraus & Bros.*, 149 F. 2d 773 (C. A. 2) reversed on other grounds, 327 U. S. 614; *Boehm* v. *United States*, 123 F. 2d 791 (C. A. 8), certiorari denied, 315 U. S. 800, rehearing denied, 315 U. S. 828.

have neither specified particular documents nor shown a genuine need for the class of documents sought. They have, in essence, shown nothing other than that they are defending a lawsuit. The Government has gone far toward making available everything of conceivable relevance or use to appellees. The demand for more is supported only by the fond hope that a more concrete reason for disclosure may develop after appellees have examined the documents. Such a hope cannot give rise to the necessity for deciding the inevitably delicate question of when, if ever, the judiciary can review the judgment of executive officers, who have also taken oaths to support the Constitution, that the public interest precludes disclosure.

CONCLUSION

For the foregoing reasons, the judgment of the district court dismissing the complaint should be reversed.

Respectfully submitted.

PHILIP B. PERLMAN,
Solicitor General.
HERBERT A. BERGSON,
Assistant Attorney General.
CHARLES H. WESTON,
STANLEY M. SILVERBERG,
RICHARD E. GUGGENHEIM,
DANIEL B. BRITT,
WILLARD R. MEMLER,
Special Assistants to the Attorney General.

MARCH 1950.

U. S. GOVERNMENT PRINTING OFFICE: 1950

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In the Supreme Court of the United States

OCTOBER TERM, 1949

No. 490

UNITED STATES OF AMERICA, APPELLANT

v.

COTTON VALLEY OPERATORS COMMITTEE ET AL.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF LOUISIANA

REPLY BRIEF FOR THE UNITED STATES

I

APPELLANT ASSERTED IN THE DISTRICT COURT THAT THE APPELLEES FAILED TO SHOW THE GOOD CAUSE REQUIRED BY RULE 34 AND THAT THEIR MOTION SOUGHT PRODUCTION OF DOCUMENTS BEYOND THE LIMITS OF PERMISSIBLE DISCOVERY

Appellees assert that the Government did not raise in the court below the objections that "good cause" for production of documents under Rule 34 had not been shown[1] and that the production sought exceeded the limits of permissible discovery.[2] To the contrary, the Government made,

[1] The Ohio Oil Company brief 8–13; Stanolind Oil Company brief 26–27.

[2] The Ohio Oil Company brief 51–52; Stanolind Oil Company brief 36–37.

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and extensively briefed, these arguments in the court below.

At the hearing on March 11, 1949, at which the district court heard argument upon the motion of The Ohio Oil Company to vacate the order of April 21, 1948, denying its motion for production of documents under Rule 34 (R. 105, 157–159), counsel for the Government, after stating that it insisted upon the privileged character of the documents sought, said "We make that point in addition to the point which was urged in our brief, which was mainly based on the Hickman vs. Taylor case * * *" (R. 157).

The brief referred to was filed on October 12, 1948, in response to The Ohio Oil Company's motion to vacate, and its pertinent sections are set forth in the Appendix (*infra*, pp. 8–15). Subsection A of Point I is headed:

> ***The Written Reports of an Agent or Employee of the Department of Justice to the Attorney General Should Not be Regarded as Subject to the Rules for Discovery, Even Though Such Reports Contain the Agent's Version of an Oral Statement Made to Him by a Person During an Interview***

Under this heading, the brief contends that FBI reports are exempt from discovery as the work product of the lawyer. It states *inter alia:*

> No case has as yet been found where the rules relating to discovery apply to what has been called "the work-product" of a

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lawyer. The defendant in this case by its motion has made more than an ordinary request for relevant non-privileged facts in the possession of the plaintiff's attorney. It has sought discovery as of right of statements of the type described above made to employees of an attorney without showing necessity for the production of the same.

As was said by the Supreme Court in *Hickman* v. *Taylor,* 329 U. S. 495 (p. 509): "We are thus dealing with an attempt to secure the production of written statements and mental impressions contained in the files and the mind of the attorney * * * without any showing of necessity or any indication or claim that denial of such production would unduly prejudice the preparation of petitioner's case or cause him any hardship or injustice."

Subsection B of Point I of the brief is entitled:

> ***The Defendant Has Failed to Show Any Necessity or Any Indication or Claim That the Denial of the Production Sought Will Unduly Prejudice the Preparation of His Case or Cause Him Any Hardship or Injustice***

The brief states:

> The only attempt made by the defendant in this case to justify the production of the records sought in its motion is contained in the affidavit of its attorney J. P. D'Artois attached to its Motion to Produce.

The brief, after describing the contents of that affidavit, continues:

> The Government submits that this is not a showing of good cause or necessity inasmuch as the Government has offered to make all documents in its possession which were obtained from any of the defendants available for inspection and copying. Further, the Government has offered to make available for inspection and copying those documents obtained from other sources which it intends to use as evidence.

This section of the brief concludes:

> The Supreme Court in *Hickman* v. *Taylor, supra,* has laid down the rule that the showing of necessity or cause for the production of oral or written statements of witnesses must be stronger than the ordinary showing of good cause or necessity for the production of documents. No such showing has been made nor is it conceivable that such a showing can be made by the defendant in view of the proposed production by the plaintiff.

The brief therefore made a full and adequate presentation of both the question whether good cause for production had been shown and the question whether the documents sought were outside the scope of permissible discovery. In addition, the opinion in *Hickman* v. *Taylor* discusses both of these issues, and Government coun-

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sel had likewise relied upon that case at the hearing on the same day in arguing at length the Government's objections to interrogatories filed by defendant Magnolia Petroleum Company (R. 107, 117).

II

THE SUPPLEMENTS TO ORDER NO. 3229 OF THE DEPARTMENT OF JUSTICE HAVE NO RELEVANCY

Supplement No. 2, as well as the other supplements or circulars issued by the Department of Justice in connection with Order No. 3229,[3] have no relevancy to this case. The supplement is solely for the private instruction of United States attorneys. It is not a public regulation. Its purpose is to inform United States attorneys of procedure to be followed in the absence of specific instruction from the Attorney General. In no sense does it bind or obligate the Attorney General. In the instant case, the Attorney General has, by affidavit, personally claimed the privilege. Such action makes Supplement No. 2 irrelevant. That supplement does not, by its literal terms or in legal effect, limit the Attorney General's right to appear and claim the privilege against disclosure.

Order No. 3229 (11 F. R. 4920) is the only regulation promulgated by the Department of

[3] These documents are set forth in the appendix to the motion to dismiss or affirm filed by appellee The Ohio Oil Company.

Justice pursuant to R. S. 161 which has been published in the Federal Register, and hence is the only regulation of the Department under that section having legal force and effect. In order to advise his own personnel as to their course of action under that regulation, the Attorney General has from time to time issued certain intra-departmental instructions entitled Supplement No. 1, Supplement No. 2, Circular No. 3259, and Circular No. 3260. These instructions are not public documents, but are limited in their application to Department of Justice personnel. They constitute nothing more than general directions as to the conduct of subordinate employees in the absence of specific contrary instructions by the Attorney General. They are not intended to, nor can they, estop the Attorney General from determining the action which he deems appropriate and in the public interest in a particular case.

Supplement No. 2 is applicable, moreover, only when a *subpoena duces tecum* has been issued at the trial of a cause.[4] It has no application to pretrial discovery procedure. By its terms, it is to be followed only "unless directed to the contrary by the Attorney General." The particular sentence upon which the appellees lay stress—"If

[4] Supplement No. 2, when distributed, was in fact accompanied by a legal memorandum which served to define the meaning of the instructions contained in the supplement.

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questioned, the officer or employee should state that the material is at hand and can be submitted to the court for determination as to its materiality to the case and whether in the best public interests the information should be disclosed"—does not have the inflexible meaning which appellees attribute to it, but merely sets forth the course to be pursued in certain circumstances in the absence of contrary instructions—such as were given here—by the Attorney General. In any event, Supplement No. 2, as we have previously shown, confers no legal right on appellees.

Respectfully submitted.

PHILIP B. PERLMAN,
Solicitor General.
HERBERT A. BERGSON,
Assistant Attorney General.
CHARLES H. WESTON,
STANLEY M. SILVERBERG,
RICHARD E. GUGGENHEIM,
DANIEL B. BRITT,
WILLARD R. MEMLER,
Special Assistants to the Attorney General.

APRIL 1950.

APPENDIX

Portion of Government's Brief in District Court Filed October 12, 1948

POINT I

A. THE WRITTEN REPORTS OF AN AGENT OR EMPLOYEE OF THE DEPARTMENT OF JUSTICE TO THE ATTORNEY GENERAL SHOULD NOT BE REGARDED AS SUBJECT TO THE RULES FOR DISCOVERY, EVEN THOUGH SUCH REPORTS CONTAIN THE AGENT'S VERSION OF AN ORAL STATEMENT MADE TO HIM BY A PERSON DURING AN INTERVIEW.

As the head of the Department of Justice, the Attorney General is the chief law officer of the Government, representing it in legal cases to which it may be a party. As such, he occupies exactly the same position in his relationship to the Government as counsel for the defendants in this case do to their clients. Just as counsel for the defendants in this case maintain a law office and are associated with other attorneys and employ investigators, clerks, and others, so does the Attorney General maintain a law office, known as the Department of Justice, and with him are associated other attorneys, clerks, accountants, and investigators. In the class of investigators there is a section of the Attorney General's law office known as the Federal Bureau of Investigation. The employees of this section are generally referred to as FBI agents, and in the performance of their duties, particularly in connection with cases such as this, their work is directed and

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supervised by the Attorney General or one of his assistants.

Usually, as was done in this case, assistants to the Attorney General prepared detailed instructions to the FBI, specifying the nature of the questions to be asked and the type of information in which the attorneys are interested. The FBI is asked to submit to the Attorney General or his assistants reports as to the results of the information secured pursuant to such request. In numerous instances, upon receipt of such reports, an additional detailed request for supplemental investigation is prepared by the attorneys. In many instances, the reports by agents merely set forth their version of what was said by persons interviewed. Almost invariably, Assistants to the Attorney General re-interview persons who were interviewed by the FBI before determination is made whether to use those persons as witnesses at trial, and the reports of interviews by the FBI are used as a guide to the attorneys in determining which persons should be interviewed by them as probable witnesses.

In addition to the questioning of persons pursuant to directives by assistants to the Attorney General, FBI agents are often asked to make examinations of books and records, and in the course of such examination, certain of them are extracted from the files of the persons or corporations and are attached to the reports made by the agent to the Attorney General.

In all of these various duties performed by the agents, they are acting in exactly the same way as the employee of a private law firm acts

in the preparation of a case for trial. The FBI agents are in no sense the agents or employees of a client of the Attorney General, but when working in the capacity above described they are agents of the Attorney General, the attorney for the United States. In the performance of this type of duty the FBI agents act the same as clerks or investigators in private law firms, as distinguished from claim agents or investigators for insurance, railroad or oil companies.

While working in the above described capacity, FBI agents submit reports to the Attorney General or his staff of attorneys concerning the matters investigated by them. These reports become in fact notes of the Attorney General to be put in his private files for his reference in the preparation of the case for litigation.

If reports of the type described under this heading are ever obtainable, it can be only under the most extraordinary circumstances. No case has as yet been found where the rules relating to discovery apply to what has been called "the work-product" of a lawyer. The defendant in this case by its motion has made more than an ordinary request for relevant non-privileged facts in the possession of the plaintiff's attorney. It has sought discovery as of right of statements of the type described above made to employees of an attorney without showing necessity for the production of the same.

As was said by the Supreme Court in *Hickman* v. *Taylor,* 329 U. S. 495 (p. 509):

> We are thus dealing with an attempt to secure the production of written state-

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> ments and mental impressions contained in the files and the mind of the attorney . . . without any showing of necessity or any indication or claim that denial of such production would unduly prejudice the preparation of petitioner's case or cause him any hardship or injustice.

Forcing an attorney or his agent to report or write out what persons have told him and to deliver the account to his adversary gives rise to grave dangers of inaccuracy and untrustworthiness. (*Hickman* v. *Taylor, Supra*) The situation presented in this case is almost identical with that presented in the *Hickman* case where at page 513 the Supreme Court said:

> Petitioner's counsel frankly admits that he wants the oral statements only to help prepare himself to examine witnesses and to make sure that he has overlooked nothing. That is insufficient under the circumstances to permit him an exception to the policy underlying the privacy of Fortenbaugh's professional activities. If there should be a rare situation justifying production of these matters, petitioner's case is not of that type.

In the oral argument heard by this Court on September 17, 1948, counsel for the defendant stated as follows on page 34 of the Official Transcript:

> We've got a right to see their report, and to see their witness and to find out what he expects to say.

Counsel's assertion that he had a right to see the report for the purpose stated is clearly re-

futed by the Supreme Court in *Hickman* v. *Taylor, supra.* In fact, in the concurring opinion of Mr. Justice Jackson, it is further stated (p. 516–517):

> Counsel for the petitioner candidly said on arguent that he wanted this information to help prepare himself to examine witnesses to make sure he overlooked nothing. He bases his claim to it in his brief on the claim that the rules were to do away with the whole situation where a lawsuit developed into "a battle of wits between counsel." But a common law trial is and always should be an adversary proceeding. Discovery was hardly intended to enable a learned profession to perform its functions either without wits or on wits borrowed from the adversary.
>
> The real purpose and the probable effect of the practice ordered by the District Court would be to put trials on a level even lower than a "battle of wits." I can think of no practice more demoralizing to the Bar than to require a lawyer to write out and deliver to his adversary an account of what witnesses have told him. Even if his recollection were perfect, the statement would be his language permeated with his inferences.

So in this case, if discovery were allowed requiring the plaintiff to produce an FBI agent's version of what some person told him, it would undoubtedly be permeated with the inferences of the agent, and as such be valueless. The similarity of the instant case and *Hickman* v. *Taylor, supra,* and the reasons why discovery should not

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be allowed, were pointed out again by Mr. Justice Jackson in the following language (p. 518):

> Having been supplied the names of the witnesses, petitioner's lawyer gives no reason why he cannot interview them himself. If an employee-witness refuses to tell his story, he too may be examined under the rules. He may be compelled on discovery as fully as on the trial to disclose his version of the facts. But that is his own disclosure. It can be used to impeach him if he contradicts it, and such a deposition is not useful to promote an unseemly disagreement between the witness and the counsel in the case.

Here the Government has offered to furnish the defendants with the names of all of the persons to be called as witnesses by the Government. It is inconceivable that this defendant can make a showing or give any reason why he cannot interview these witnesses himself and get their version of the facts as required.

B. THE DEFENDANT HAS FAILED TO SHOW ANY NECESSITY OR ANY INDICATION OR CLAIM THAT THE DENIAL OF THE PRODUCTION SOUGHT WILL UNDULY PREJUDICE THE PREPARATION OF HIS CASE OR CAUSE HIM ANY HARDSHIP OR INJUSTICE

The only attempt made by the defendant in this case to justify the production of the records sought in its motion is contained in the affidavit of its attorney J. P. D'Artois attached to its Motion to Produce. In that affidavit it is stated in substance that certain agents of the Federal Bureau of Investigation approached the Cotton

Valley Operators Committee and upon request were allowed to examine all books, records and other information contained in the files of the Committee relating to operations conducted in connection with the production, processing, and manufacturing of liquid and gaseous hydrocarbons produced from the Cotton Valley Field; that the agents were given full and complete access to all records and information and that they withdrew or made copies of or memoranda of the documents made available to them. With respect to this portion of the affidavit Mr. D'Artois further states that the extent to which records, documents, etc. were withdrawn from the files of Cotton Valley Operators Committee or obtained from other sources are unknown to persons outside the Department of Justice. The Government submits that this is not a showing of good cause or necessity inasmuch as the Government has offered to make all documents in its possession which were obtained from any of the defendants available for inspection and copying. Further, the Government has offered to make available for inspection and copying those documents obtained from other sources which it intends to use as evidence.

The remainder of the affidavit of Mr. D'Artois relates to reports made by the FBI agents to the Attorney General of the United States disclosing in detail the results of their investigations in respect to the methods of operations by the defendants at the Cotton Valley Field. For the reasons set forth under Part A of Point I such reports are not a proper subject of discovery.

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The Supreme Court in *Hickman* v. *Taylor, supra* has laid down the rule that the showing of necessity or cause for the production of oral or written statements of witnesses must be stronger than the ordinary showing of good cause or necessity for the production of documents. No such showing has been made nor is it conceivable that such a showing can be made by the defendant in view of the proposed production by the plaintiff.

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CLERK

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1949

No. 490

THE UNITED STATES OF AMERICA,
Appellant,

vs.

COTTON VALLEY OPERATORS COMMITTEE,
ET AL.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF LOUISIANA

MOTION OF MAGNOLIA PETROLEUM COMPANY TO DISMISS

DIXON CARROLL,
WALACE HAWKINS,
EARL A. BROWN,
CHAS. B. WALLACE,
Counsel for Appellee,
Magnolia Petroleum
Company.

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IN THE DISTRICT COURT OF THE UNITED STATES
FOR THE WESTERN DISTRICT OF LOUISIANA
SHREVEPORT DIVISION

Civil Action No. 2209

UNITED STATES OF AMERICA,
Plaintiff,

v.

COTTON VALLEY OPERATORS COMMITTEE,
ET AL.,
Defendants

MOTION OF APPELLEE MAGNOLIA PETROLEUM COMPANY TO DISMISS

Filed Nov. 23, 1949. Philip H. Mecom, Clerk, U. S. Dist. Court, West. Dist. of Louisiana.

To: The Clerk of the United States District Court for the Western District of Louisiana, Shreveport Division; or, in the alternative, to the Clerk of the Supreme Court of the United States, Washington, D. C.—whichever clerk has possession of the record under Rule 12, sec. 3, Rules of the Supreme Court of the United States

Now comes appellee Magnolia Petroleum Company in the above-numbered and -entitled cause and for motion to

dismiss under Rule 12, sec. 3, Rules of the Supreme Court of the United States, respectfully shows to the Court the following:

I

Appellee Magnolia Petroleum Company was served on or about November 16, 1949 with the papers preliminary to the perfection of appeal as prescribed by Rule 12, sec. 2, Rules of the Supreme Court of the United States, and this motion to dismiss is made within fifteen (15) days after such service, as provided for by Rule 12, sec. 3, Rules of the Supreme Court of the United States.

II

For its first ground on which this motion to dismiss is based appellee Magnolia Petroleum Company respectfully shows to the Court that the judgment of the trial court dismissing this suit is not a "final judgment" within the terms and provisions of the act of June 9, 1944, c. 239, 58 Stat. 272; June 25, 1948, c. 646, § 17 62 Stat. 989, eff. Sept. 1, 1948; 15 U. S. C. A. § 29.

And in such connection appellee Magnolia Petroleum Company further shows that the dismissal below was the result of the failure of plaintiff, United States of America, to first produce for the Court's inspection certain documents or copies of the written instruments and that such dismissal was solely occasioned because of the refusal of plaintiff, United States of America, to first produce such instruments for the Court's inspection, and in such connection appellee Magnolia Petroleum Company shows further that the decree below does not terminate the litigation between the parties on the merits of the case.

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III

For its second ground on which this motion to dismiss is based appellee Magnolia Petroleum Company further shows to the Court that the judgment of the trial court dismissing this suit is not a "final judgment" within the terms and provisions of the act of June 9, 1944, c. 239, 58 Stat. 272; June 25, 1948, c. 646, § 17, 62 Stat. 989, eff. Sept. 1, 1948; 15 U. S. C. A. § 29.

And in such connection appellee Magnolia Petroleum Company further shows that the dismissal below did not dispose of the prayer of this appellee for the affirmative relief, as contained in its Thirty-second Defense and in its prayer, which defense and prayer are as follows:

> *"Thirty-second Defense*
>
> "Now comes defendant Magnolia Petroleum Company and affirmatively prays judgment of the Court declaring that the contract of the CVOC, as approved by the Corporation Commission of the State of Louisiana, be declared in all things legal and valid and not violative of federal antitrust laws, and this defendant further prays that the Court enter judgment declaring that the operations of the CVOC as formerly, presently, and as contemplated in the future be deemed to constitute no violation of the federal antitrust laws.
>
> " * * *
>
> "WHEREFORE, premises considered, this defendant prays judgment of the Court that plaintiff take nothing and that it go hence with its costs without day; this defendant prays judgment for declaratory relief as to the CVOC contract and the operations of CVOC."

IV

Appellee Magnolia Petroleum Company has attached hereto, in support of this motion to dismiss, a memorandum trial brief.

WHEREFORE, premises considered, appellee Magnolia Petroleum Company prays the Court to dismiss this cause for lack of jurisdiction herein.

DIXON CARROLL,
Ricou-Brewster Building,
Shreveport, Louisiana.
WALACE HAWKINS,
EARL A. BROWN,
CHAS. B. WALLACE,
2311 Magnolia Building,
P. O. Box 900,
Dallas, Texas.
Tel. C-4131, Sta. 248,
L.D. 246.
Attorneys for Appellee,
Magnolia Petroleum
Company.

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MEMORANDUM BRIEF IN SUPPORT OF MOTION OF APPELLEE MAGNOLIA PETROLEUM COMPANY TO DISMISS.

In support of its first ground to dismiss: the dismissal below was not a termination of the litigation between the parties on the actual merits of the case.

This dismissal of the court below was the result of the failure of the Government to comply with a preliminary interlocutory order of the Court requiring production of documents before the Court itself. There was no determination between the parties on the actual merits of the case at such stage of the proceedings, and any disposition which such order of dismissal had would only act indirectly upon the parties or the merits of the case.

Parsons v. *Robinson*, 122 U. S. 112;
Catlin v. *U. S.*, 324 U. S. 229;
Heike v. *U. S.*, 217 U. S. 423.

In support of its second ground to dismiss: the dismissal below did not dispose of the prayer of appellee Magnolia Petroleum Company for affirmative declaratory relief.

The affirmative prayer of appellee Magnolia Petroleum Company for declaratory relief involved the validity of the CVOC contract and the operations under this contract, both in the past, in the present, and as contemplated. This involved the same elements complained of by the United States and was not an entirely distinct claim, nor was it a matter distinct from the general subject of litigation, nor did it affect only parties to a particular controversy. In order for the judgment below to be final, such decree of dismissal must be not only final but must be complete, that

is, final not only as to all parties but as to the whole subject-matter and as to all the causes of action involved.

Collins v. *Miller*, 252 U. S. 364, 370;
Arnold v. *U. S.*, 263 U. S. 427, 434;
Nyanza Steamship Company v. *Jahncke Dry Dock*, 264 U. S. 439, 440;
Reeves v. *Beardall*, 316 U. S. 283, 285.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1949

No. 490

UNITED STATES OF AMERICA,

Appellant

versus

COTTON VALLEY OPERATORS' COMMITTEE, ET AL.

On Appeal From the United States District Court for the Western District of Louisiana, Shreveport Division.

MOTION TO DISMISS OR AFFIRM.

Now comes THE OHIO OIL COMPANY, appellee, herein appearing through its undersigned counsel, and moves this Court to dismiss the appeal taken herein upon the following grounds:

1. The Order for Dismissal of this cause,

from which this appeal is prosecuted, was based solely upon the refusal of the government to submit certain reports of investigations, letters, telegrams, etc. (discovery of which was sought by defendants under Rule 34, Rules of Civil Procedure) to the Trial Judge for his determination of the government's claim of "privilege" in respect thereto (*R. 218* et seq.);

2. The specific ground for the dismissal of the action (as such) is not assigned as error in the assignment of errors filed herein *(R. 222)* or included in the statement of points to be relied upon *(R. 266)* and, consequently (pursuant to the provisions of Section 9 of Rule 13 of this Court) will not be considered; and

3. The appellant, having failed to assign as error the specific and only ground upon which the judgment appealed from was based, has failed to effectually comply with Rule No. 9 of this Court, and the sole ground for dismissal not being presented, this appeal should be dismissed.

In the alternative, appellee moves this Court to affirm and for reason therefor shows:

4. Should the assignment of errors herein *(R. 222 and 223)*, the substance of which is set

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forth in assignments Nos. 1 and 2 thereof[1], be construed as properly presenting the contention asserted by the government in the Court below, as set forth in the affidavit attached to its Motion to Vacate the order allowing qualified discovery:

> " * * that it is exclusively within the exercise of the judgment of the Attorney General to determine whether or not the reports and correspondence sought to be examined are privileged; that this prerogative derives from the Constitution of the United States and is in no way affected or changed by the Rules of Civil Procedure Relating to Discovery, particularly Rule 34; that under the authority of R. S. 161 (5 U. S. C. A. 22) (a copy of which is attached hereto and made a part hereof as Exhibit A) the heads of the

---

1/ Assignment 1. "The court erred in dismissing the complaint for the failure of plaintiff to produce for inspection reports of the Federal Bureau of Investigation during the period from February 1, 1946 to June 17, 1947 and all correspondence of the Department of Justice during the Period from August 1, 1945 to June 17, 1947, relating to the subject matter of this action.

Assignment 2. "The court erred in granting defendants' motion for the production of the aforesaid documents, as more particularly set forth in said motion, notwithstanding the affidavits of the Attorney General that these documents are privileged and confidential in the public interest."

Assignments Nos. 3 and 4 merely divide the import of assignment No. 2 to cause the same to apply separately to the F. B. I. reports sought and then to letters, telegrams, etc., and assignment No. 5 merely recites the asserted legal sources of the position assumed in that assignment.

Assignment No 6 is that "The Court erred in granting defendants' motion for the production of aforesaid documents in that they were not designated, nor was good cause shown, as required by Rule 34, Federal Rules of Civil Procedure." but the point was not passed upon in the Court below and, consequently, no question relating thereto is now before the Court. **Missouri Pacific Railway Company v. Fitzgerald, 160 U. S. 556; 40 L. Ed. 536.**

> Executive Departments of the Government are authorized to determine which documents of their departments are to be considered confidential and not subject to disclosure;" *(R. 163)*

then, —

5. The question upon which that contention depends is so wanting in substance as not to need further argument, for:

(a) The Constitution does not provide for a complete separation of the powers of the several branches of the government.

Ex parte Grossman, 267 U. S. 87;

(b) The assertion of immunity of a department of the executive branch of the government from rules of procedure of the court to which it has resorted for judicial relief is not supported by the provisions of R. S. 161, which does not purport to grant any such immunity[2] and is in conflict with settled precedent by which it has been established that a sovereign power by voluntarily appearing in the role of suitor abandons its immunity from suit and subjects itself to the procedure (and rules of decision) governing the forum which it has sought.

2/ "The head of each department is authorized to prescribe regulations, not inconsistent with law, for the government of his department, the conduct of its officers and clerks, the distribution and performance of its business, and the custody, use, and preservation of the records, papers, and property appertaining to it (R. S. §161.)" **5 U. S. C. A. §22.**

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Guaranty Trust Company of New York v. United States of America, 304 U. S. 126;

United States v. The Thekla, 266 U. S. 328, 340, 341;

United States v. Stinson, 197 U. S., 200, 205;

and

(c) All claim to the asserted immunity or privilege was certainly without merit whatever when counsel for the government herein (an employee of the Department of Justice) appeared in the Court with the documents sought to be reached in his possession and there, after being questioned with regard thereto[3], refused to submit those documents to the Court for determination as to their materiality to the case and whether in the best public interest the information should be disclosed when that procedure was then expressly provided for by Supplement No. 2 to Order 3229, promulgated by the Attorney General on June 6, 1947, and still in effect subsequent to May 5, 1949:

> "If questioned, the officer or employee should state that the material is at hand and can be submitted to the court for determination as to its materiality to the case and whether in the best public interests the information should be disclosed."

3/ R. 207, 208 and 217.

(See certified copy of Order No. 3229 as supplemented attached hereto.)[4]

United States of America ex rel Touhy v. Joseph E. Ragen, No. 9916 on the docket of the U. S. Court of Appeals for the Seventh Circuit (decision rendered February 24, 1950, not yet reported).

WHEREFORE, appellee respectfully submits this statement showing that the questions upon which the decision of this case depends are so unsubstantial as not to need further argument; and appellee respectfully moves the Court to dismiss this appeal, or, in the alternative, to affirm the decree of the United States District Court for the Western District of Louisiana.

Respectfully submitted,

A. M. GEE,
539 South Main Street,
Findlay, Ohio.

C. F. CURRIER,
Commercial National Bank Building,
Shreveport, Louisiana.

LEON O'QUIN,
424 First National Bank Building,
Shreveport, Louisiana.

ARTHUR O'QUIN,
424 First National Bank Building,
Shreveport, Louisiana.

COUNSEL FOR THE OHIO OIL COMPANY.

4/ For some reason Supplement No. 2 to Order No. 3229 promulgated by the Attorney General was not filed by plaintiff (R. 164-165).

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Unites States of America

Department of Justice

March 9, 1950

Pursuant to Title 28, Section 1733, U. S. Code (Public Law 773, 80th Congress), I hereby certify that the annexed paper is a true copy of the original record in this Department, of Order No. 3229 dated May 2, 1939; Circular No. 3229, Supplement No. 1, dated December 8, 1942; and Order No. 3229, Supplement No. 2, dated June 6, 1947; Circular No. 3259, dated June 14, 1939; and Circular No. 3260, dated June 24, 1939.

SEAL

IN WITNESS WHEREOF, I have hereunto set my hand, and caused the seal of the Department of Justice to be affixed, on the day and year first above written.

PETER CAMPBELL BROWN,

The Assistant to the Attorney General

A. R. C.

U. S. Government
Printing Office
16-21703

OFFICE OF THE ATTORNEY GENERAL
WASHINGTON, D. C.

May 2, 1939.

ORDER NO. 3229

Pursuant to authority vested in me by R. S. 161 (U. S. Code, Title 5, Section 22), it is hereby ordered:

All official files, documents, records and information in the offices of the Department of Justice, including the several offices of United States Attorneys, Federal Bureau of Investigation, United States Marshals, and Federal penal and correctional institutions, or in the custody or control of any officer or employee of the Department of Justice, are to be regarded as confidential. No officer or employee may permit the disclosure or use of the same for any purpose other than for the performance of his official duties, except in the discretion of the Attorney General, The Assistant to the Attorney General, or an Assistant Attorney General acting for him.

Whenever a subpoena *duces tecum* is served to produce any of such files, documents, records or information, the officer or employee on whom such subpoena is served, unless otherwise expressly directed by the Attorney General, will appear in court in answer thereto and respectfully decline to produce the records specified therein, on the ground that the disclosure of such records is prohibited by this regulation.

FRANK MURPHY
Attorney General.

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DEPARTMENT OF JUSTICE

Washington, D. C.

December 8, 1942

CIRCULAR NO. 3229

Supplement No. 1

TO UNITED STATES ATTORNEYS AND MARSHALS:

It has been called to my attention from time to time by several United States Attorneys that Officers in the Provost Marshal Branch have requested information from United States Attorneys about suspected or established incendiarism or other sabotage of war material, war premises and war utilities, including the disposition of such cases.

In that connection I wish to call to your attention the Department of Justice Order No. 3229 dated May 2, 1939 which reads in part:

"All official files, documents, records and information in the offices of the Department of Justice, including the several offices of United States Attorneys, Federal Bureau of Investigation, United States Marshals, and Federal penal and correctional institutions, or in the custody or control of any officer or employee of the Department of Justice, are to be regarded as confidential. No officer or employee may permit the disclosure or use of the same for any purpose other than for the performance of his official duties, except in the discretion of the At-

torney General, The Assistant to the Attorney General, or an Assistant Attorney General acting for him."

All such inquiries should, therefore, be referred to this office. It is the earnest desire of the Department of Justice to cooperate as fully as possible with the Armed Forces. However, offices of the United States Attorneys do not ordinarily compile such statistics as are here requested. This is primarily the responsibility of the Federal Bureau of Investigation. Please explain courteously to the various Officers making such requests that the Federal Bureau of Investigation transmits to G2 (Military Intelligence) exhaustive statistics on such cases. The information available to Military Intelligence is kept current daily by the Federal Bureau of Investigation. Inquiry by Officers of the Provost Marshal Branch should, therefore, be made to the War Department in Washington.

Please refer all inquiries of a similar nature to the office of The Assistant to the Attorney General in order that a uniform policy may be worked out. This office will make every effort to furnish the necessary information to the War Department.

JAMES ROWE, JR.

The Assistant to the Attorney General.

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DEPARTMENT OF JUSTICE

Washington 25, D. C.

June 6, 1947.

ORDER NO. 3229

Supplement No. 2

TO ALL UNITED STATES ATTORNEYS
PROCEDURE TO BE FOLLOWED UPON RECEIVING A SUBPOENA DUCES TECUM

Whenever an officer or employee of the Department is served with a subpoena duces tecum to produce any official files, documents, records or information he should at once inform his superior officer of the requirement of the subpoena and ask for instructions from the Attorney General. If, in the opinion of the Attorney General, circumstances or conditions make it necessary to decline in the interest of public policy to furnish the information, the officer or employee on whom the subpoena is served will appear in court in answer thereto and courteously state to the court that he has consulted the Department of Justice and is acting in accordance with instructions of the Attorney General in refusing to produce the records. The officer or employee should bring with him a certified copy of Order No. 3229, prohibiting the unauthorized disclosure of official records, since the court does not take judicial notice of an intra-departmental order of this sort which is not published. The United States Attorney should be informed of the exact time of the subpoenaed person's appearance in court and be notified at once if there is any difficulty about persuading the court to accept the cer-

tified copy of the order as an answer to the demand to produce the records.

It is important that there should be no appearance of arbitrary refusal to comply with the subpoena and that every respect should be paid to the court's order. Therefore, the officer or employee should, unless directed to the contrary by the Attorney General, bring with him the records and documents which are called for by the subpoena even though the Department takes the position that it is not necessary to produce them. Thus, a subpoena is complied with, although a reason is offered for not actually submitting the documents requested.

It is not necessary to produce the original documents; copies of official records, removal of which from the Department's own files would cause great inconvenience, are acceptable in response to a subpoena. If a subpoena is so vague and general in its terms that it would require the production of all the files with relation to a given matter, there should be a request for a more specific statement as to what is required. It is not necessary to bring the required documents into the court room and on the witness stand when it is the intention of the officer or employee to comply with the subpoena by submitting the regulation of the Department (Order No. 3229) and explaining that he is not permitted to show the files. If questioned, the officer or employee should state that the material is at hand and can be submitted to the court for determination as to its materiality to the case and whether in the best public interests the information should be disclosed. The records should be kept in the United States Attorney's office or some similar place of safe-keeping near the court room. Under no circumstances should the name of any confidential informant be divulged.

TOM C. CLARK
Attorney General.

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DEPARTMENT OF JUSTICE
Office of the Assistant to the Attorney General
WASHINGTON

June 14, 1939.

CIRCULAR NO. 3259
Re: Order No. 3229
of May 2, 1939.

In view of the fact that a considerable number of inquiries have been received in respect to the purpose and the application of Order No. 3229 of May 2, 1939, attention is invited to the fact that the principal purpose of the Order was to put in written form the practice that had informally existed in the Department of Justice for a great many years. It was not intended to change preexisting usage or to make inaccessible any information that has theretofore been furnished to the public, to the newspapers, or to other officials of the Government.

The formal regulation contained in the Order is based on the decision of the Supreme Court in *Boske* v. *Commingore*, 177 U. S. 459, which relates to subpoenas *duces tecum* for the production of Government documents. The Order does not apply to clerks of United States courts, or to United States Commissioners, since such officials are not attached to the executive branch of the Government, but constitute a part of the personnel of the judiciary. The order is applicable solely to the personnel of the Department of Justice as such, which includes the officials and employees of the seat of Government, the United States Attorneys and their staffs, the offices of the Federal Bureau of Investigation, the United States Marshals and their staffs, and the Federal penal and correctional institutions.

MATTHEW F. McGUIRE,
Acting Assistant to the Attorney General.

DEPARTMENT OF JUSTICE

Office of the Assistant to the Attorney General

Washington

June 24, 1939

CIRCULAR NO. 3260

Referring to Order No. 3229 of the Attorney General concerning the disclosure of official files, documents, records, and information in the custody or control of any officer or employee of the Department of Justice, the following will apply in suits against the United States involving contracts of war risk term and United States Government life insurance.

United States Attorneys and attorneys representing the Bureau of War Risk Litigation may disclose to the plaintiff or his attorney the following records which have been held to be admissable in evidence:

1. The military and medical records pertaining to the insured, which are furnished by the War and Navy Departments, except such portions as are privileged under Section 11 of the Selective Service Regulations.

2. Applications for insurance, applications for reinstatement, and conversion, and information as to lapse or present status of insurance; also as to premium deductions made during service.

3. Claims for insurance benefits and denials there-

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of by the Veterans Administration, its representatives or agencies.

4. Reports of examinations by Government physicians, names and addresses of such physicians, and information as to hospitalization of the insured in Government hospitals.

5. Information as to compensation or other benefits paid on behalf of the insured.

Should any question arise as to the disclosure of other information or records contained in the files, attorneys will decline to make such disclosure unless authorized by the Director of the Bureau of War Risk Litigation.

MATTHEW F. McGUIRE

Acting Assistant to the Attorney General

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Office - Supreme Court, U. S.
FILED
APR 7 1950
CHARLES ELMORE CROPLEY

IN THE

Supreme Court of the United States

OCTOBER TERM, 1949

No. 490

UNITED STATES OF AMERICA, APPELLANT

vs.

COTTON VALLEY OPERATORS COMMITTEE ET AL.

On Appeal from the United States District Court for the Western District of Louisiana

BRIEF OF MAGNOLIA PETROLEUM COMPANY

CHAS. B. WALLACE
2311 Magnolia Building
Dallas, Texas
Attorney for Appellee
Magnolia Petroleum Company

Of Counsel:

DIXON CARROLL
Ricou-Brewster Building
Shreveport, Louisiana

WALACE HAWKINS
EARL A. BROWN
Dallas, Texas

IN THE

Supreme Court of the United States

OCTOBER TERM, 1949

No. 490

UNITED STATES OF AMERICA, APPELLANT

vs.

COTTON VALLEY OPERATORS COMMITTEE ET AL.

On Appeal from the United States District Court for the Western District of Louisiana

---

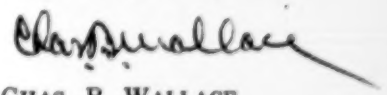
BRIEF OF MAGNOLIA PETROLEUM COMPANY

Without waiving its motion to dismiss, but in fact still insisting thereon and subject thereto, appellee Magnolia Petroleum Company enters this as its appearance and adopts as its own the briefs filed and arguments made and to be filed and made on behalf of appellee The Ohio Oil Company and appellee Stanolind Oil and Gas Company, to all intents and purposes as though it had joined in each of these briefs and had itself made such arguments.

Magnolia Petroleum Company will not otherwise appear and will not present oral argument, and, in so far as it is concerned, requests the Court as to it to submit this case on its motion to dismiss and on the briefs and arguments of appellee The Ohio Oil Company and appellee Stanolind Oil and Gas Company.

Appellee Magnolia Petroleum Company, upon such motion, briefs, and arguments, prays the Court either to dismiss this appeal or to affirm the judgment of the district court dismissing the complaint.

Respectfully submitted,



CHAS. B. WALLACE
2311 Magnolia Building
P. O. Box 900
Dallas, Texas
Tel. C-4131, Sta. 248; L. D. 246
Attorney for Appellee
Magnolia Petroleum Company

Of Counsel:

DIXON CARROLL
Ricou-Brewster Building
Shreveport, Louisiana

WALACE HAWKINS
EARL A. BROWN
Dallas, Texas

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APR 8 1950
CHARLES ELMORE CROPLEY
CLERK

Supreme Court of the United States

October Term 1949

No. 490

THE UNITED STATES OF AMERICA,
Appellant,

vs.

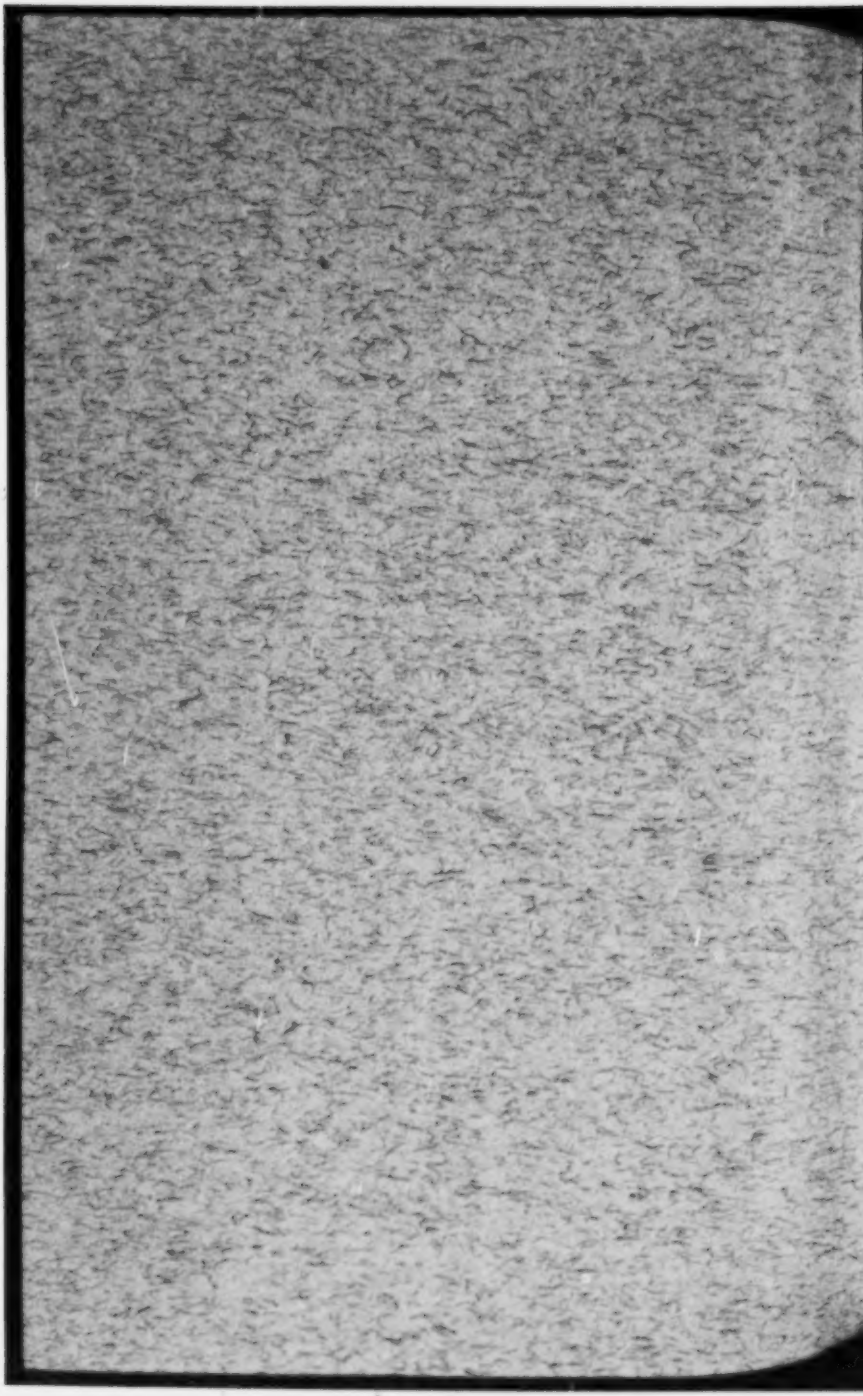
COTTON VALLEY OPERATORS COMMITTEE, ET AL.,
Appellees

BRIEF FOR APPELLEES STANOLIND OIL AND GAS COMPANY AND TEXAS GULF PRODUCING COMPANY

DONALD CAMPBELL,
W. W. HEARD,
DAN MOODY,
CHARLES L. BLACK
Attorneys for Appellee Stanolind Oil and Gas Company.

DAN MOODY,
CHARLES L. BLACK
Attorneys for Appellee Texas Gulf Producing Company.

BLACK & STAYTON,
Of Counsel.



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Supreme Court of the United States

October Term 1949

No. 490

THE UNITED STATES OF AMERICA,
Appellant,

vs.

COTTON VALLEY OPERATORS COMMITTEE, ET AL.,
Appellees

BRIEF FOR APPELLEES STANOLIND OIL AND GAS COMPANY AND TEXAS GULF PRODUCING COMPANY

Statement of the Facts of the Case and Issues Arising Thereon

Appellant's statement of the case is in part incorrect and in part incomplete, omitting vitally essential details. It therefore presents an incorrect view of the case. The sole position taken by the appellant in the district court was that the Attorney General himself

was "exclusively" vested with the power to determine whether the documents called for in the motion to produce were privileged and that he had made that determination and nothing remained to be done except to communicate the determination to the court. The sole function of the court, according to the position then taken, was to receive the determination made by the Attorney General and give full effect to it against the appellees. (R. 163, 218-220.) No mention was made of an alleged failure to show "good cause." In this Court appellant now asserts that Ohio Oil Company's motion to produce (adopted by the appellees filing this brief) was not supported by a showing of "good cause."

How could there be "good cause" determinable by the court when the whole issue as to whether the documents should be produced was determinable by the Attorney General "exclusively?" However much "good cause" might have been shown, the cause as determined by the court would be a mere futility when faced by the finding of the Attorney General that all of the documents were privileged. If the failure to show "good cause" objection had been urged, appellees could have amended their motion; but, even then, the amendment, however sufficient, would have amounted to nothing, in the face of the Attorney General's determination that the documents were privileged and were therefore inadmissible, "good cause" or no "good cause." It would have been impossible to show "good cause" for the production of the documents that were privileged.

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Additional Statement

1. *The question of privilege was determinable by the Court and not by the Attorney General.*

We think that an additional statement is needed to put before the Court the precise question to be determined.

Question Presented

The question presented is not whether the documents should be produced for inspection and copying by the defendants. Originally that was the issue tendered by the motion to produce. (R. 33.) But, after various hearings were held (R. 56, 77, 159, 212-220), the issue finally narrowed itself to this single question:

Whether in a proceeding such as this, in which the United States is the moving party, the exclusive right to determine the privileged nature of the documents in the possession of the Attorney General is vested in the Attorney General or in the court trying the case.

The position of the Government on the question is shown by the following statement of the Assistant Attorney General to the district court (R. 197):

"Mr. Britt: May it please the Court, we are here today on a motion by the government to vacate an order made on March 11th on the motion of the Ohio Oil Company to require the government to produce reports made to the Attorney General by agents of

the Federal Bureau of Investigation. The substance of the order was that the reports be submitted to the court for its determination as to whether or not they were privileged. The Attorney General, in an affidavit, has taken the position which is uniform throughout the country that the determination of whether these reports are privileged lies within his discretion exclusively."

The question was emphasized as shown by the following colloquy between the Assistant Attorney General and the district court (R. 217-218):

"THE COURT: * * * *.

"I am not convinced that the matter of privilege should be left exclusively to the Attorney General, but I believe it is my duty to determine this question by an examination of the documents.

"MR. BRITT: May it please the Court, as I indicated this morning, I have been ordered to come before your Honor and say that I have the reports with me, but it is my instruction to respectfully decline to produce them to your Honor under these circumstances.

"THE COURT: Mr. Britt, the only alternative then, as I appreciate it, is to direct you to do that within a fixed time, and if it is not done within that fixed time to dismiss the suit.

"MR. BRITT: Well, that is the way it is, your Honor.

"THE COURT: I see no other course to take except to follow this course as a legal solution to the matter, so you will be given a certain length of time, after which if you fail to produce the case will have to be dismissed.

"Of course, you would have the right then to go to the Appellate Court.

"MR. BRITT: I think that would be a very good course to follow, your Honor.

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"THE COURT: Then I will give you 10 days in which to submit these documents to the Court, and if not done within that time then this suit will be dismissed.

"MR. BRITT: I am perfectly willing for the time to start now, if your Honor pleases. I have them here, and I still refuse to produce them.

"THE COURT: All right, let the suit be dismissed at this time."

The chronological order of events which resulted in the question and the reasoning of the district court thereon is shown by the following final judgment entered by the district court (R. 218-220):

"*Judgment and Order Filed Sept. 20, 1949.*

"On November 7, 1947, the Ohio Oil Company, one of the defendants in this case, filed a motion to require plaintiff to produce for inspection, certain documents, including reports of the Federal Bureau of Investigation, correspondence, etc., with various persons, all as stated in said motion, which is made part hereof. Similar motions were filed by the other defendants. The Court, having recalled and quashed certain subpoenas *duces tecum*, obtained *ex parte* by the Magnolia Petroleum Company, another defendant, for reasons stated in the written opinion on January 2, 1948, its attention was called to the fact that it had not passed upon the said motion of The Ohio Oil Company. Being of the impression that the latter was, in all material respects, similar to the motion to produce and subpoenas *duces tecum* previously disposed of on said January 2, 1948, the said motion of the Ohio Oil Company was, on April 21, 1948, denied in a memorandum opinion filed April 22, and as appears from a written order to that effect filed June 1, 1948.

"Counsel for other defendants had filed similar motions to produce and, at the several hearings, appeared and joined in the contentions of The Ohio Oil Company.

"Thereafter, on August 26, 1948, the said The Ohio Oil Company filed a motion to vacate the said order of April 21, 1948, which had denied its motion to produce and this was argued and submitted on September 17, 1948. Subsequently, the matter was, on February 21, 1949, reset for hearing on March 11, 1949, at which time, having heard further arguments, it was ordered that the Government produce the documents requested by The Ohio Oil Company 'with the right to submit to the Court for ruling any documents they desired to claim to be privileged.'

"On May 10, 1949, plaintiff filed a motion to vacate said order of March 11, 1949, and on June 15, following, it was heard and defendants declined to accept the Government's offer of partial compliance by filing an abstract of factual information contained in the reports of the Federal Bureau of Investigation, and the Court indicated its purpose to adhere to the ruling requiring the Government to produce the documents. At this time counsel for the Government requested time to contact the Attorney General, before the Court finally ruled on the said motion to vacate, which was granted, and on the following day, June 16, 1949, when the hearing was resumed and the Court denied the said motion to vacate, counsel for the Government was given additional time to consult with the Attorney General as to whether the Court's order to produce would be complied with, and the question of what was to be done in case of refusal was reset for July 7, 1949.

"On the last mentioned date, counsel for the Government appeared and submitted further authorities as to the right of the Attorney General to claim and for himself determine the question of pri-

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vilege as to the documents called for in the motions to produce. Thereupon, after considering said cases, the Court stated from the Bench that to sustain this contention, would in effect, amount to an abdication of the Court's duty to decide the matter and leave it entirely in the hands of the Attorney General; that if the documents were submitted to the Court, with such claims as to privilege as the Attorney General desired to make, they would be considered and if it appeared, in the Court's judgment, that production of any part thereof would be injurious to public interest, they would be excluded; otherwise, the order to produce for the inspection of defendants would be sustained. This, having been declined, counsel was told that a reasonable time would be allowed for further consideration, and the latter, stating no additional time was desired, the Court announced that the only course left was to dismiss the complaint for failure to comply with its orders. All the motions by both sides, above enumerated, and the minutes of the Court, and notes of the court reporter are made part hereof.

"IT IS THEREFORE ORDERED, ADJUDGED AND DECREED THAT this cause be dismissed for the failure of plaintiff to comply with the Court's order to produce for its inspection the documents called for in the motions, so it could determine the question of privilege under the law.

"Done and signed on this September 19th, 1949."

2. *The claim of the Government that there was a failure to show "good cause."*

Nothing was said at the final hearing or at any prior hearing to the effect that the defendants had failed to show "good cause." That issue was not even mentioned in the district court and no decision in respect of it was made by the district court.

What is quoted above made it perfectly plain that the cause was dismissed "for failure of the plaintiff to comply with the Court's order to produce for its inspection the documents called for in the motions, so it could determine the question of privilege *under the law.*" (R. 220; italics supplied.)

That was the only question presented in the district court and it is the only question reviewable here. The issue of alleged failure to show "good cause" was tendered for the first time in appellant's Assignment of Errors (No. 6), filed under Rule 13 of this Court. (R. 222-223.) It is a question presented originally to this Court.

The Government filed its "*Motion to Vacate Order of March 11, 1949, Directing the Plaintiff to Produce Reports Made by Agents of the Federal Bureau of Investigation.*" (R. 161.) It attached to this motion to vacate a lengthy affidavit of the Attorney General, in which he claimed that the documents called for in the motion to produce were all confidential and that the power to determine the issue of privilege was "exclusively within the exercise of the judgment of the Attorney General." Further, that his assistants had advised him "of the nature of the contents" of the documents called for and that he had determined, in the exercise of the power exclusively vested in him, that they were privileged and hence would not be produced even for inspection by the court. (R. 162-164.) That was the sole ground presented in the motion to vacate the order to produce.

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Summary of the Argument

1. When the United States, as plaintiff, comes into one of its courts, it must submit to the rules applicable to all other litigants coming into that court. It comes into one of its courts, not as a sovereign or the Government, but simply as an ordinary litigant.

2. When the Attorney General filed a formal affidavit claiming that the documents were privileged, he, in effect, tendered the issue of privilege to the court for determination. As attorney for one of the litigants, he had no more authority to determine that issue with finality and conclusiveness thar had the attorney for any other litigant. Like any other attorney, he could present the claim of privilege but he could not determine it.

3. The Attorney General in refusing to produce the documents was acting as an attorney for the Government. His refusal to produce had no more effect than the refusal of an attorney for any other litigant.

4. Whether the documents were privileged was a judicial question, determinable only by the judicial department of the Government. It could not be determined by the executive department of the Government. The executive department is not entitled to participate with the judiciary in the performance of essentially judicial functions. If it be admitted that the executive regulation as to the privileged character of the documents in question is supreme when the question arises in the executive field, it can not be such when it arises in the judicial field.

5. The executive regulation on which the Government relies, purportedly promulgated under R. S. 161 (5 U.S.C.A. 22), properly construed, was not effective to entitle the Attorney General to participate in the judicial process of determining the admissibility of evidence upon a trial in one of the courts of the United States. The very statute under which it was promulgated requires that such a regulation not be "inconsistent with law." It would be inconsistent with law if it authorized the Attorney General, acting as attorney for the United States, to determine whether evidence was privileged and for that reason inadmissible upon a trial conducted in one of the courts of the United States. Whether evidence is admissible upon a trial is essentially a judicial question and a member of the executive department is not entitled to participate in its decision. The Government's position is in conflict with many decisions having classic standing, notably *Hayburn's Case*, 2 Dallas 409 (all three opinions) and *Gordon v. United States*, 117 U.S. 697, to say nothing of many others.

6. *Boske v. Comingore*, 177 U. S. 459, so strongly relied upon by the Government is not applicable. The Government was not a party to that action. It therefore could not possibly have involved the question that is involved in this action—the duty of the Government, as a litigant, to conform to the Rules of Civil Procedure binding on all *litigants*, including the Government. The regulation considered in that case was simply one of the Secretary of the Treasury for-

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bidding his subordinates to allow the use of official papers except for the purpose of aiding in the collection of the revenues of the United States.

7. In the *Boske* case it was held that the administrative regulation was not "inconsistent with law." In the instant case it is in effect contended that the administrative regulation is "inconsistent with law;" that is, it is admittedly inconsistent with the Rules of Civil Procedure relating to discovery, and particularly Rule 34.

8. The question as to whether "good cause" was shown was not raised in the district court. The Government stood on the claim of privilege formally presented in an affidavit filed by the Attorney General himself. (R. 169.) The Government filed its "Motion to Vacate" the order requiring production of the documents and set out in the motion the single ground upon which it relied—that the documents were privileged. The claim that "good cause" was not shown, not having been presented to the district court, it cannot be presented for the first time here. (Rule 46.)

9. Sufficient "good cause" was shown to compel the production of the documents at least for the limited purpose of enabling the court to determine the question of privilege which had been formally and *voluntarily* tendered by the Attorney General in an affidavit. Especially is this true when the Attorney General's representative admitted that he had the documents in his possession, in the very presence of the court, and yet refused to produce them for the limited purpose of judicial inspection.

BRIEF OF ARGUMENT

I.

The question of privilege was determinable by the court and not by the Attorney General.

The question presented for decision is obviously an important one. Defendants contend that the question of privilege is one for judicial determination, just as any other question concerning the admissibility of evidence. It is a question for determination by the court in which the action is pending. *Contra*, the Government claims that the question of privilege is an executive one, to be exclusively determined by the Attorney General, and that when he has made the determination, it is final. The court is made a mere dummy, whose determination, if it makes any, has no effect whatever when faced by a contrary determination of the Attorney General. The opposing party is helpless. The Rules of Civil Procedure relating to discovery are completely defeated in their operation. The result is one kind of trial between ordinary litigants and a wholly different kind of trial—a one-sided trial—when the Government is a party. The Rules of Civil Procedure become inoperative against the Government. The Government becomes a favored litigant, entitled to withhold its evidence from the court even for the limited purpose of an examination of that evidence by the court to determine whether such evidence is in fact privileged and therefore inadmissible. The question as to whether certain evidence is confidential and privileged is but a question of admissibility of that evidence.

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If the Attorney General, acting in his capacity as attorney for the Government, has the power to determine with finality and conclusiveness that certain evidence is inadmissible because privileged, then he had as well be vested with the power to determine in the same way, and with the same conclusiveness, all questions relating to the materiality and relevancy of evidence and the competency of witnesses.

The contention of the Government that power is vested in the Attorney General to determine the question of privilege and to force his determination on the court, whether right or wrong, is wholly erroneous and entirely untenable. It is in conflict with many decided cases and in conflict with the Federal Rules of Civil Procedure.

Note that the claim of privilege is a broad and general one, not based upon any specific allegation of fact concerning the nature of the documents. The claim is simply that the F. B. I. reports and the correspondence of the Attorney General, regardless of their contents, are confidential and privileged and their production cannot be compelled in any court. The "Motion to Vacate"—the only pleading filed by the Government in opposition to the discovery—presented nothing except the general claim that the documents, regardless of their contents, were, as a matter of law, confidential and privileged and that no one was entitled to examine them to determine that fact except the Attorney General himself.

The main, if not sole, reliance is on *Boske v. Comingore*, 177 U. S. 459. That reliance is without support.

Rule 1, entitled "Scope of Rules," provides:

"These rules govern the procedure in the district courts of the United States in all suits of a civil nature whether cognizable as cases at law or in equity, with the exceptions stated in Rule 81. They shall be construed to secure the just, speedy, and inexpensive determination of every action."

Rule 81 here referred to states the exceptions. Many are stated but none is stated exempting the United States from the rule or giving the Attorney General the right, through a mere administrative regulation, to add to, alter, amend or defeat the law set forth in the Federal Rules of Civil Procedure.

The very way in which the Government attempts to use the Attorney General's regulation demonstrates that it is void. The Government affirms that the force of the regulation is such as, in effect, to exempt the Government from the duty to produce, under Rule 34, the documents and records in the possession of the Attorney General. Under Rule 34, whether such records and documents shall be produced depends upon a judicial decision. They say that the regulation makes it depend upon an administrative or executive decision by the Attorney General. If that be true, then the regulation must fall. Rule 34 is a law and must stand. In *Morrill v. Jones*, 106 U. S. 466, 467, this Court said:

"The Secretary of the Treasury cannot by his regulations alter or amend a revenue law. All he can do is to regulate the mode of proceedings to carry into effect what Congress has enacted. In the present case we are entirely satisfied the regulation acted

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upon by the collector was in excess of the power of the Secretary. The statute clearly includes animals of all classes. The regulation seeks to confine its operation to animals of 'superior stock.' This is manifestly an attempt to put into the body of the statute a limitation which Congress did not think it necessary to prescribe. Congress was willing to admit duty free all animals specially imported for breeding purposes; the Secretary thought this privilege should be confined to such animals as were adapted to the improvement of breeds already in the United States. In our opinion, the object of the Secretary could only be accomplished by an amendment of the law. That is not the office of a treasury regulation."

In the case of *United States v. George*, 228 U. S. 14, 20, 21, this Court held that certain sections of the Revised Statutes, including Section 161, *here invoked by the Government*, conferred "administrative power only"; that this was indubitably true of Section 161, and that therefore a regulation promulgated under it, in conflict with a statute, could not stand.

In *International Ry. Co. v. Davidson*, 257 U. S. 506, 514, the Court, citing *United States v. George*, *supra*, and *Morrill v. Jones*, *supra*, said:

"Section 161 does not confer upon the Secretary any legislative power."

Here it is in effect claimed that the regulation promulgated by the Attorney General under Section 161 has the force of legislation, because, according to the Government, it has amended Rule 34, which, before amendment, was applicable to all litigants, including the United States.

The same ruling was made in the later case of *Williamson v. United States*, 207 U. S. 425, 462, involving a regulation of the General Land Office. Discussing the broad power of the Commissioner of the General Land Office to adopt rules and regulations, this Court said:

"* * * But this power must in the nature of things be construed as authorizing the Commissioner of the General Land Office to adopt rules and regulations for the enforcement of the statute, and cannot be held to have authorized him, by such an exercise of power, to virtually adopt rules and regulations destructive of rights which Congress had conferred."

The same ruling was made in *United States v. United Verde Copper Co.*, 196 U. S. 207, 215. In that case the Court, dealing with a regulation promulgated by the Secretary of the Interior, said:

"* * * If rule 7 is valid, the Secretary of the Interior has power to abridge or enlarge the statute at will. If he can define one term, he can another. If he can abridge, he can enlarge. Such power is not regulation; it is legislation. The power of legislation was certainly not intended to be conferred upon the Secretary."

Many other authorities might be cited but we deem this wholly unnecessary. The Government in its brief has demonstrated that the Attorney General's regulation, if in conflict with Rule 34 or if altering or amending that rule in any respect whatever, is absolutely void.

The Federal Rules of Civil Procedure have the force of law. Considered as a whole, they constitute

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the law prescribing how *all suits* of a civil nature shall be tried in the courts of the United States. An administrative regulation promulgated by an executive officer can have no force in the face of these conflicting rules.

The requirement in R. S. 161 that the regulations must not be "inconsistent with law" means *any law*, statutory or general, including the law of evidence. It means that an executive officer cannot amend or alter the law of evidence by a mere regulation.

The Federal Rules of Civil Procedure became effective on September 1, 1938. (Rule 86.) The Attorney General's order, purporting to give a confidential and privileged character to "all official files, documents and records and information in the offices of the Department of Justice," was promulgated under date of May 2, 1939. The effect here claimed for this administrative order No. 3229 is that it amended or repealed, in part, the discovery rules, including Rule 34, set forth in the Federal Rules of Civil Procedure that became effective nearly one year prior to th effective date of said executive order No. 3229. (R. 24.) To state the question thus raised is enough. The Attorney General could not by any administrative regulation either alter, amend or repeal the discovery rules set forth in the Federal Rules of Civil Procedure. He could not exempt himself and the Department of Justice from these discovery rules.

As we have said, the Government relies upon *Boske v. Comingore*. It relies on that case too much and its reliance is misplaced. Insofar as that case may be in conflict with Rule 34, it announces a rule of decision outmoded by the Federal Rules of Civil Pro-

cedure. It must yield to them, not only because they are laws later in point of time, but because the *Boske* case involved merely an administrative regulation promulgated by an executive officer and required by the supporting law to be "not inconsistent with law." Nothing can be gotten out of the *Boske* case to support the position taken here, which is that the Attorney General's regulation has created an exception to Rule 34, otherwise applicable to all litigants. That exception is that the Attorney General is entitled to participate in the judicial process of determining whether the documents in his possession are privileged and to participate in such a way as to override and wholly defeat any opposing determination of the court trying the case.

Furthermore, as we have shown in the Summary of Argument the *Boske* opinion does not support the interpretation placed upon it by the Government. The United States was not a party to that action. The opinion, therefore, could not have prescribed any authoritative rule in respect of the question of privilege presented in an action brought by the Government. That case could not have held that under the *present* Rules of Civil Procedure the Attorney General may participate with the court in performing the essentially and exclusive judicial function of determining the question of privilege.

As we have already pointed out, in the *Boske* case it was held that the administrative regulation was not "inconsistent with law." Here it is admitted, and of necessity even contended, that the administrative regulation is "inconsistent with law." It is con-

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tended that its effect was to amend Rule 34 and the other discovery rules putting the Government on a level with all other litigants.

The following Federal cases hold that the United States, becoming a litigant, stands on a level with all other litigants:

The Siren, 7 Wall. 152;
United States v. The Thekla, 266 U. S. 328, 339-340;
United States v. General Motors Corporation, 2 F.R.D. 528, 530.

In *United States v. Yellow Cab Company*, decided December 5, 1949 (94 L. Ed. adv. sheet No. 3, p. 123), it was held that the Rules of Civil Procedure apply to appeals by the Government "as well as to those by other litigants." This holding applies also to the discovery rules. They apply to the Government in the same way as to all other litigants unless they have been repealed or amended perforce by Order No. 3229 of the Attorney General, promulgated by him after the Rules of Civil Procedure were already adopted.

See also *Bank Line v. United States*, 163 F. (2d) 133, 138.

There are many other cases but we deem it unnecessary to cite them. There is no conflict in the judicial statement of the rule.

The Government's position as taken in this case is in conflict with the essential nature of the judicial process.

The executive, the legislative, and the judiciary, is each supreme in its own field. Admit that the exe-

cutive's regulation as to the privileged character of the documents in question is supreme when the question arises in the executive field, it cannot be in the judicial field. The judiciary must be supreme and its determination binding in matters judicial even though one of the litigants is the United States. This is shown by *Hayburn's Case*, 2 Dallas 409, and by *Gordon v. United States*, 117 U. S. 697, and the line of cases dealing with the Court of Claims which held that the determination by a constitutional federal court (and this includes district courts) could not be subject to executive action. To hold to the contrary would make the judiciary subservient to the executive; render the judiciary but an arm of the executive; and rob the matter before the court of its justiciability.

Even where the United States has consented to be sued and is the *defendant*, the executive still may not supervise judicial action. *United States v. Gordon, supra.* *A fortiori* should this be true where the United States is *plaintiff*. The essence of the judicial process is that the court decides, and its decision must bind the litigants, including the United States. Here, if the Government's position be sustained, the court makes no real decision concerning the admissibility of this evidence claimed to be privileged. The question of privilege is not decided by it but by the Attorney General.

Note that the district court is not compelling the plaintiff to disclose its information, claimed to be secret and confidential; nor punishing its lawyers for contempt. The judiciary has carefully avoided impinging upon the executive but if the executive wants

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a judicial adjudication on the merits, the executive, like all other litigants, must submit its claim of privilege to, and abide by, the decision of the court. The court leaves it open to the executive to preserve the alleged secret and confidential character of its information simply by keeping it, and the transaction to which it is related, out of court. But the Attorney General is not entitled to put a blindfold on the court and have it announce a decision, never arrived at by it, but only by him.

We cite *Crosby v. Pac. S.S. Line*, 133 F. (2d) 470, 475, cert. den. 319 U.S. 752; *Zimmerman v. Poindexter*, 74 F. Supp. 933, 936; *Wigmore on Evidence*, Vol. 8, Sec. 2379.

II.

If any privilege existed, it was waived.

If in fact any privilege of nondisclosure was applicable in favor of the Government, it was waived when the Government came into court as an actual party in interest. As a litigant it must disclose everything relating to the transaction upon which it bases its suit. In *United States v. Andolschek*, 142 F. (2d) 503, 506, the court said:

"* * * While we must accept it as lawful for a department of the government to suppress documents, even when they will help determine controversies between third persons, we cannot agree that this should include their suppression in a criminal prosecution, founded upon those very dealings to which the documents relate, and whose criminality they will, or may, tend to exculpate. So far as they

directly touch the criminal dealings, the prosecution necessarily ends any confidential character the documents may possess; it must be conducted in the open, and will lay bare their subject matter. The government must choose; either it must leave the transactions in the obscurity from which a trial will draw them, or it must expose them fully."

See also:

United States v. General Motors Corporation, 2 F. R. D. 528;
Bowles v. Ackerman, 4 F. R. D. 260;
Fleming v. Bernardi, 4 F. R. D. 270;
Walling v. Richmond Screw Anchor Company, 4 F. R. D. 265;
Brewer v. Hassett, 2 F. R. D. 222;
Bank Line v. United States, 163 F. (2d) 138;
United States v. Burr, 25 Fed. Cases 30, 34.

The Government brought this case out into the open. When it did that it brought into the open everything—all evidence—relating to the case. Whatever privilege may have attached to the evidence, or any part of it, before the suit was filed was waived by its filing. This same reasoning would have applied to the *Boske* case if the United States had been a party to that suit. It would be a novel rule, indeed, that would permit one litigant to admit, as did the Government here, that it has evidence in its possession—even in open court (R. 217)—and then deny the power of the court to compel production. The Government's attorney, referring to the documents called for, told the court: "I have them here and I still refuse to produce them." (R. 218.) It was not claimed that they were immaterial—an objection de-

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terminable by the court alone—but simply that they were privileged. It was not claimed that they did not relate to the transaction the Government had brought into court. To the contrary, it was in effect admitted that they did. The only claim urged was that the Attorney General had decided that they were privileged and that the attorney representing the Government had come before the court only for the purpose of communicating this decision, allegedly final in character, to the court.

We submit that if the evidence called for was privileged in the first instance, the privilege was waived. The Government is not entitled to bring a transaction or a cause of action into court and at the same time withdraw its evidence from the control of the court.

III.

The Government's position is in conflict with Supplement No. 2 to Order No. 3229, promulgated by the Department of Justice June 6, 1947.

Supplement No. 2 to Order No. 3229 applies specifically to a subpoena *duces tecum*, but it involved a recognition by the Department of Justice that the question of privilege is one to be determined by the court and not by the Attorney General. We quote the following from the recently decided case of *United States of America, ex rel. Roger Touhy, Relator, vs. Joseph E. Ragen, Respondent, George R.*

McSwain, Appellant (U.S.C.A. (7th Cir.), decided February 24, 1950), setting forth the provisions of Supplement No. 2:

"The directive so far as here material provides:

" 'Therefore, the officer or employee should, unless directed to the contrary by The Attorney General, bring with him the records and documents which are called for by the subpoena even though the Department takes the position that it is not necessary to produce them. Thus, a subpoena is complied with, although a reason is offered for not actually submitting the documents requested.'

"It provides further:

" 'It is not necessary to bring the required documents into the court room and on the witness stand when it is the intention of the officer or employee to comply with the subpoena by submitting the regulation of the Department (Order No. 3229) and explaining that he is not permitted to show the files.'

"Immediately following that which we have just quoted is a statement which while somewhat confusing and ambiguous appears to amount to a contraction of the unlimited privilege otherwise possessed by the Department of Justice. The directive provides:

" 'If questioned, the officer or employee should state that the material is at hand and can be submitted to the court for determination as to its materiality to the case and whether in the best public interests the information should be disclosed. The records should be kept in the United States Attorney's office or some

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similar place of safekeeping near the court room. Under no circumstances should the name of any confidential informant be divulged.' "

Supplement No. 2, although applying specifically to a subpoena *duces tecum*, constitutes a direct recognition by the Department of Justice that the question of privilege is one to be determined by the court and not by the Attorney General. The order of the district court in this case required production of the documents for its inspection. Supplement No. 2 provides that "the officer or employee should state that the material is at hand and can be submitted to the court for determination as to its materiality to the case and whether in the best public interests the information should be disclosed." It appears, therefore, that compliance with Supplement No. 2 by the Assistant Attorney General trying this case for the Government would have been compliance with the order of the district court. Why, then, was Supplement No. 2 not produced in the trial of this case? No answer has been given in the Government's brief.

Supplement No. 2 was directly involved in the case above cited, *Touhy v. Ragen*. The United States Attorney in that case offered to provide the disputed documents to the court for its personal inspection. The court was unwilling, in the absence of opposing counsel, to examine the material for the purpose of determining its materiality and whether it was in the best interest that such information should be disclosed. The Court of Appeals held that "this was the precise duty imposed upon the court." Similarly, in this case, the district court held that "I am not convinced that the matter of privilege should be left ex-

clusively to the Attorney General, but I believe it is my duty to determine this question by an examination of the documents."

The following is quoted from the opinion in the *Touhy* case.

"More than that, in a colloquy between counsel and the court prior to the calling of McSwain as a witness, *the District Attorney offered to provide the documents and material called for in the subpoena to the court for its personal inspection.* This procedure was satisfactory to counsel for the relator, who stated, 'My own feeling is that the proper thing to do would be to permit the Court to examine these things without any of us.' To this proposal, agreed to by counsel for both McSwain and the relator, the court stated, 'I don't want to see them—I don't want to see them without counsel.'

"Thus, the court was unwilling to examine the material for the purpose of determining its materiality and whether it was in the best public interest that such information should be disclosed. *In our view, this was the precise duty imposed upon the court, and McSwain was not required to produce for any other purpose. The court's refusal in this respect, previously announced in open court, perhaps accounts for the fact that McSwain when on the stand was not requested to make production for such purpose.*" (Italics supplied.)

IV.

The claim of the Government that there was a failure to show "good cause."

The first point urged in this Court is a point that was not even mentioned in the district court; that is,

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that the defendants in their motion failed to show "good cause" for the production of the documents.

We have heretofore stated the facts concerning this contention and have shown that it was brought into the case for the first time in the prosecution of the appeal to this Court. It was first mentioned when the appellant filed its "Assignment of Errors and Prayer for Reversal." (R. 222-223.) This was too late. This was a step, not in the trial, but in the prosecution of the appeal which was taken on the same day, November 14, 1949. (R. 221.)

The motion to produce of The Ohio Oil Company was filed October 25, 1947. (R. 33.) The order finally entered requiring production only for inspection by the court to determine the issue of privilege was signed September 19, 1949. (R. 218-220.) The matter was therefore before the court for nearly two years. It was heard on March 11, 1949 (R. 159), again on June 15 and 16, 1949 (R. 196-207), and again on June 13, 1949 (R. 212-218). Full argument was presented, pro and con, at these hearings but there was never any suggestion that the defendants had failed to show "good cause" for the production of the documents. The whole controversy centered around the issue of privilege. That The Ohio Oil Company in its motion attempted to show good cause cannot be denied and we think the showing was sufficient. Be that as it may, no objection was ever urged to the showing. *It was treated as a sufficient showing.*

At the conclusion of the hearing of March 11, 1949, the court announced orally that an order would be made requiring the production of the documents,

but that if privilege was claimed as to any particular document, it would be separated from the others and the issue of privilege as to it determined at a later time. (R. 160.) *This appeal was not taken from that order.* Thereupon, the Government filed its motion "to vacate order of March 11, 1949" and attached thereto the affidavit of the Attorney General setting forth that all of the reports made by agents of the Federal Bureau of Investigation to the Attorney General were confidential and privileged. (R. 161-164.) Thereafter the entire controversy centered around this claim.

This motion of the Government "to vacate order of March 11, 1949" was a direct attack by the Government upon the oral order made on March 11, 1949, to grant the motion to produce of The Ohio Oil Company. (R. 161.) It was the only attack made on that motion in the district court. This motion to vacate was supported by a *single* ground and that was the ground set forth in the affidavit of the Attorney General attached to the motion. (R. 162.) In the motion to vacate it was not claimed, directly or indirectly, that the order should not have been entered because The Ohio Oil Company had failed to show "good cause." Is the Government entitled now to shift its ground on appeal and rely upon such alleged failure, instead of being confined to the single ground set forth in the motion to vacate filed in the district Court?* It pointed out to the district court in plain terms the alleged vice in the order; that is, that the documents were confidential and privileged, as claim-

* Under Rule 46, Rules of Civil Procedure, this cannot be done.

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ed in the affidavit of the Attorney General. It said nothing about a failure on the part of The Ohio Oil Company to show good cause for the production of the documents, which would have justified setting aside the order to produce, privilege or no privilege. On the other hand, if the finding of the Attorney General on the issue of privilege was conclusive as is now urged in this Court, then it would have been impossible to show "good cause" for the production of the documents.

After thus voluntarily and formally tendering the issue of privilege as to all of the documents, the Government refused in open court to permit their inspection by the court to determine the issue of privilege. The attorney for the Government stated that he had been ordered "to come before your Honor and say that I have the reports with me, but it is my instruction to respectfully decline to produce them to your Honor under these circumstances." (R. 217.) And, again the attorney for the Government said: "I have them here, and I still refuse to produce them." (R. 218.) The validity of the court's final order must be determined upon a consideration of the precise nature of the order. The plaintiff was not commanded to produce any document or other evidentiary material for inspection and copying *by the defendants.* They were to be produced merely for the *inspection by the court.* The plaintiff, through an affidavit of the Attorney General, had already voluntarily tendered the claim that they were privileged (R. 162-164) and that issue could not be determined by the *court* without inspecting the docu-

ments. The following is quoted from the record of the hearing held on June 15, 1949, to show the position of the court (R. 205):

"THE COURT: Do you know what that resolves itself into? You are becoming the Judge and ruling whether this stuff should be produced or not. Isn't that inescapable?

"MR. BRITT: No, not exactly, unless under the authority of the Attorney General—

"THE COURT: This is relegating to the Attorney General the responsibility of acting as Judge as to whether these things should be produced.

"MR. BRITT: I guess it does amount to that.

"THE COURT: I will give you time to see. I am not going to grab you by the nape of the neck and force you on that. My desire is to pass on it in accordance with what I believe to be the law.

"MR. BRITT: Am I to inform the Attorney General—

"THE COURT: *My position is this: Before I would rule upon your motion to vacate the order heretofore entered I must see those documents and form my own judgment as to whether or not all or any part of them shall be produced during the trial.*" (Italics supplied.)

Such also was the final position taken by the court. The documents were to be produced only for the court's inspection, in order that it might determine the correctness of the claim of privilege. (R. 217-218.) The court's final judgment recites that the case was dismissed, not for failure to produce for inspection by the defendants, but for failure "to comply

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with the Court's order to produce for its inspection the documents called for in the motions, so it could determine the question of privilege under the law." (R. 220.)

We think the motion of The Ohio Oil Company was entirely sufficient. It was as certain and definite as such a motion could well be, considering its nature, and whether it sufficiently showed "good cause" for producing the documents for inspection and copying by the defendants is a question not here involved. At all events, no formal order was ever entered at any time sustaining the motion of The Ohio Oil Company to produce the documents for inspection and copying by the defendants. A qualified ruling sustaining that motion was orally announced (R. 160) but before any order was entered a claim of privilege applicable to all of the documents was presented, supported by an affidavit of the Attorney General (R. 161-164.) Thereafter the issue was narrowed to this: Should the documents be produced for inspection by the court to enable it to "determine the question of privilege under the law?" (R. 220.) That was the only order to produce that was ever entered—an order entered on the issue voluntarily tendered by the Attorney General that all of the documents were privileged—and it was entered to enable the court to "determine the question of privilege under the law."

Appellant is in effect complaining of something that did not happen on the trial of the case. It seeks a reversal because of the claim that The Ohio Oil Company did not show "good cause" *in its motion.*

It is sufficient to say that no order was ever entered granting the motion and the dismissal was decreed, not for failure to comply with that motion, but for failure to comply with the court's limited ruling that the documents should be produced for the court's inspection. That expressly appears from the final judgment. (R. 220.)

If any showing of "good cause" was required to support the exact and limited order that was entered by the court—an order to produce for inspection by the court in order that it might determine "the question of privilege under the law" (R. 220)—then that "good cause" was supplied not only by The Ohio Oil Company's motion but by the Attorney General's affidavit, setting forth that the documents called for were all privileged. That question was formally tendered by the Government and it had to be determined by the court and not by the Government. The effort to show that it was "exclusively" determinable by the Attorney General himself has wholly failed, as we have heretofore shown.

Appellant in its Assignment of Errors (No. 6) asserts that the motion was insufficient because it failed to *designate* the documents that were to be produced. (R. 223.) That assignment has not been carried into its brief and therefore has not been presented to this Court. It has been waived. But under any view, the correctness of that contention must be tested by the actual situation of fact as shown by the record and not *in vacuo*. The Attorney General knew what documents were desired because he set forth in his affidavit (Par. 2) that he had been informed by his assistants that an order had been en-

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tered "requiring the production for examination and inspection by the Court of certain reports made by agents of the Federal Bureau of Investigation to the Attorney General relating to the subject matter of the above entitled action, in the course of their investigation of this case." (R. 162.) He further set forth in his affidavit "That the inspection by the Court of the said reports is for the purpose of affording the Court an opportunity to determine whether a claim of privilege by the Attorney General is well taken or whether, in the opinion of the Court, the reports should be made available to the defendants for inspection and copying." (R. 162-163.)

In the same affidavit he stated that "deponent has been informed by his assistants in the Antitrust Division *of the nature of the contents of the agents' reports of their investigation of this case.*" (R. 163.) He followed this by a formal claim that all of the correspondence thus described by him and sought to be examined "are privileged," and that the power to determine this issue of privilege is "exclusively within the exercise of the judgment of the Attorney General." (R. 163.)

The Attorney General could not have made the finding that the documents were privileged without knowing what documents were referred to and what they contained. He stated that his assistants had informed him of the nature of the contents of these reports. If he could produce them for his own inspection, he could produce them for the Court's inspection. His representative handling the case, Mr. Britt, was able to identify the documents, because he stated in open court that he had brought

them from Washington to Shreveport and told the court at least twice that he had them in his possession, in open court, but would not produce them because he had been directed by the Attorney General to stand on the claim that they were confidential and privileged.

In determining whether language is vitiated by generality, we must hold in mind the person to whom the language is addressed. *Cooper v. Dasher*, 290 U. S. 106, 109-110, is applicable here. That was a bankruptcy case in which the district court entered a turnover order "for the return by the respondent" of certain property that he had concealed and withheld from the trustee. It was contended, and the Court of Appeals held, Hutcheson, J., writing the opinion, that the order was too general and was fatally defective because it was lacking in the requisite certainty and definiteness and for failure to describe the property to be turned over to the trustee. This Court, in an unanimous opinion written by Mr. Justice Cardozo, reversed this holding of the Court of Appeals and in doing so said:

"Misunderstanding of the mandate is upon the facts in this record an illusory peril. The order gives the only description that the nature of the case allows. The respondent, and no one else, is in a position to supply a better one. *The mandate is addressed to him, and to him its meaning is definite, however indefinite to others.* If it is clear enough to be understood, it is clear enough to be obeyed. 'All evidence,' said Lord Mansfield in *Blatch v. Archer*, 1 Cowper 63, 65, 'is to be weighed according to the proof which it was in the power of one side to have produced and in the power of the other side to have

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contradicted.' *Kirby v. Tallmadge*, 160 U. S. 379, 383. The validity of this order is to be subjected to a kindred test. Words after all are symbols, and the significance of the symbols varies with the knowledge and experience of the mind receiving them. The certainty of a description is always a matter of degree. *Doherty v. Hill*, 144 Mass, 465; 11 N. E. 581; *Marks v. Cowdin*, 226 N.Y. 138, 143; 123 N. E. 139. 'In every case the words must be translated into things and facts by parol evidence.' Holmes, J., in *Doherty v. Hill, supra*, p. 468. How many identifying tokens we are to exact the reason and common sense of the situation must tell us. There are times when a restraining order enjoins the commission of acts that are not within the peculiar knowledge of the one to be enjoined. *In re Huntley*, 85 Fed. 889, 893; cf. *Ketchum v. Edwards*, 153 N. Y. 534, 539; 47 N. E. 918. In that event the requirement of definiteness assumes a new importance, and failure to give heed to it may even make the order void. No doubt it is wise, irrespective of the knowledge of the parties, to make the terms of the order as definite as possible. The findings of the referee show that this is what was done. To insist upon more would be to sacrifice the substance of the right to the magic of a formula. In the ensuing war of words the wrongdoer would be enabled to slip away from his pursuers and take advantage of his wrong." (Italics supplied.)

The Attorney General representing the Government knew what was to be produced. If he did not, then he should have required further specification before making the affidavit setting forth that all of the documents were privileged. (R. 163.) The Government's lawyer(Mr. Britt) knew what was to be produced. That satisfies any requisite of certainty.

It cures any failure on the part of the defendants to describe the documents more particularly. It is necessary here to come back to the point that the order was made by the court itself; in effect, on its own motion for the purpose of vindicating its authority to determine the tendered issue of privilege and not by way of sustaining the motion to produce filed by The Ohio Oil Company and other defendants.

If we are to go back to The Ohio Oil Company's motion, then we submit that it was entirely sufficient. It was sufficient to be understood by the Attorney General himself and by his representative. They did not stand on the plea now urged that there was a failure to show "good cause" in the motion. They stood on the plea of privilege.

This alleged failure to show "good cause" is plainly an afterthought. It was presented only in connection with the perfecting of the appeal. The Government's lawyers did not evolve this theory until nearly two months after the trial. The evolution was too late; at least the presentation was too late.

V.

There is no merit in the Government's claim, urged for the first time on appeal, that the production of documents required by the district court's order exceeds the limits of permissible discovery under Rule 34.

What we have said above constitutes a sufficient answer to the claim that the order to produce went beyond the "permissible scope" of discovery. That issue should have been presented to the district court

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and it could have been intelligently determined by it only upon a consideration of the documents—each of them. It is not for a litigant to determine and assert with conclusiveness that a given order to produce goes beyond the "permissible scope" of discovery. That claim must be presented to the judge trying the case. It must be submitted to his sound and informed discretion. When a litigant's attorney has the documents in his actual manual possession in open court and refuses even to let the judge see them, it is difficult to see how that litigant is in a position to say that the order to produce goes beyond the "permissible scope" of discovery.

If the course had been pursued here that was pursued in *United States v. Cohen*, 145 F. (2d) 82, 92, the case might stand in a different light. There the documents in question were inspected first by the trial judge and, believing that they had no impeaching value—and it was claimed that they did have impeaching value—, he sealed them and they were made a part of the record on appeal. The appellate court (2d Circuit, opinion by Learned Hand) again examined them and arrived at the same conclusion. See also, by the same court, *United States v. Krulewitch*, 145 F. (2d) 76.

It must be remembered that objections to a discovery, like objections to the admissibility of evidence, are determinable, not by the litigant, but by the court. The litigant is entitled, and is required, to present objections, but he is not entitled to decide them. The appellant filed a written motion to vacate the oral order of March 11, 1949, requiring production of the documents, and, pursuant to the require-

ments of Rule 46, set out the ground—the single ground—upon which it relied. It is too late to now bring in other grounds.

VI.

Conclusion

To review all of the authorities, or any considerable number of them, cited in the Government's brief would unduly extend this brief and would be to present matter having no bearing upon a proper settlement of the appeal. It is sufficient to say that without exception they are inapplicable; they are not in point, either in their determination of the issue of privilege or the issue of "good cause." Insofar as they are cited on the privilege question, they are not in point because in them the issue of privilege was determined by the court and not by an executive officer. Here there was a refusal in open court even to permit the court to inspect the documents, without which no question of privilege or whatnot affecting their admissibility could be determined. Insofar as they deal with the issue of "good cause," they are equally lacking in pointed application. As we have before shown, rather tediously and with perhaps undue repetition, that issue is presented here in an entirely novel light. It was presented too late. The issue was determined by the Attorney General without the intervention of the court. None of the authorities cited hold that a litigant is entitled to determine for himself this issue of "good cause." He must submit it to the trial judge and that was

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never done in this case. We further submit that the appellant is complaining of an order never entered—an order granting The Ohio Oil Company's motion and requiring the plaintiff to produce for inspection and copying by the defendants. The only order entered was one, as the judgment recites, requiring the plaintiff to produce for the court's inspection "the documents called for in the motions, so it could determine the question of privilege under the law." (R. 220.)

We further submit that if any error was committed in respect to this "good cause" issue, it was harmless error under Rule 61 of the Rules of Civil Procedure and under new Title 28, U.S.C., Sec. 2111. The failure to present the point to the trial court was sufficient evidence of that fact. For nearly two years, and during at least four hearings, the Government made only one objection to the motion to produce—privilege. It did not question the sufficiency of the showing of "good cause." It moved to set aside the order of March 11, 1949, but not on that ground. It was treated as an inconsequential matter by the Government, not worthy of notice. It is too late to notice it for the first time on appeal. Rule 61 and new Title 28, U.S.C., Sec. 2111, plainly apply.

What we have above said applies also to the claim that The Ohio Oil Company's motion to produce went beyond the "permissible scope" of discovery. The issue thus tendered could be determined only upon examination of the documents, one by one. When appellant refused to permit this to be done, it waived this point. In fact, not a single question raised by

the appellant is determinable so long as the appellant holds the documents and refuses to permit the court to examine them. The very nature of each and all of the questions required such examination.

Finally, we submit that there is no merit in any of the points raised in the Government's brief unless it be first held that the power was vested in the Attorney General "exclusively," as was claimed in open court, to determine the issue of privilege. (R. 163.) With that point determined adversely to the Government's contention and in favor of the court's power to make such determination, all other contentions of the appellant vanish from the case.

Appellees pray that the judgment appealed from be affirmed.

Respectfully submitted,

DONALD CAMPBELL,
W. W. HEARD,
DAN MOODY,
CHARLES L. BLACK,
Attorneys for Appellee
Stanolind Oil and Gas Company.

DAN MOODY,
CHARLES L. BLACK
Attorneys for Appellee
Texas Gulf Producing Company.

BLACK & STAYTON,
Of Counsel.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1949

No. 490

UNITED STATES OF AMERICA, APPELLANT

v.

COTTON VALLEY OPERATORS' COMMITTEE, ET AL.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF LOUISIANA

BRIEF FOR THE OHIO OIL COMPANY ET AL., APPELLEES.

This civil action brought in the District Court of the United States for the Western District of Louisiana under the provisions of paragraph 4 of the Sherman Act *(15 U. S. C. §4)* to restrain alleged violations of paragraphs 1 and 2 of that statute was dismissed in the Trial Court pursuant to the provisions of Rules 37 and 41 (b) of the Rules of Civil Procedure upon the refusal of plaintiff to comply with an order of the court. From the order for dismissal plaintiff prosecutes this appeal under the provisions of *15 U. S. C. § 29.*

STATEMENT OF CASE

All questions which may be presented upon this appeal arise in consequence of orders rendered in connection with a motion originally made by the defendant, The Ohio Oil Company, (upon a showing of "good cause" therefor) to require plaintiff to produce for inspection, etc. (Rule 34) certain documents and letters then in the possession and under the control of the Attorney General and the response of the government to those orders.

For ready reference we quote the motion referred to[1] which appears at page 33 of the Record herein:

> "Defendant The Ohio Oil Company moves the Court for an order requiring plaintiff to produce and permit defendant to inspect and copy:
>
> 1. All reports (with exhibits attached thereto or filed therewith) made by agents or employees (or any agent or employee) of the Federal Bureau of Investigation to the Attorney General or to the Department of Justice of the United States during the period extending from February 1, 1946, to the date of institution of this action relating to:
>
> (a) The methods of operations conducted by this defendant alone or in association with the other defendants herein (or any number thereof) in or in connection with the production, processing, and marketing of liquid and gaseous hydrocarbons produced from the

---

1. For supporting affidavit showing "good cause" see Record, page 34, et seq.

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Cotton Valley Field in Webster Parish, Louisiana;

(b) The methods of operations conducted by this defendant alone or in association with the other defendants herein (or any number thereof) through or under the supervision of Cotton Valley Operators Committee in or in connection with the production, processing and marketing of liquid and gaseous hydrocarbons produced from the Cotton Valley Field of Webster Parish;

(c) The functions performed by the Cotton Valley Operators Committee in or in connection with the production, processing and marketing of liquid and gaseous hydrocarbons produced from the Cotton Valley Field in Webster Parish.

2. All letters, telegrams, and other communications of every kind or copies thereof (together with copies of replies thereto) received by the Department of Justice of the United States (during the period extending from August 1, 1945, to the date of institution of this action) from private individuals, corporations or associations (including parties to this action) relating to methods of operations conducted by this defendant or any other defendant herein, alone or in association with other defendants (or any number thereof) in or in connection with the production, processing and manufacturing of liquid and gaseous hydrocarbons produced from the Cotton Valley Field of Webster Parish.

"Plaintiff has (through the Attorney General of the United States, under whose direction,

supervision and control this action is maintained) the possession and custody of each of the documents mentioned, which contain evidence relating to matters within the scope of the examination permitted by Rule 26 (b), as more fully shown by the affidavit attached hereto."

Just what occurred in the Trial Court which lead to the order for dismissal is clearly and concisely stated in that judgment and order (R 218, et seq.), from which we quote the following:

"On November 7, 1947, the Ohio Oil Company, one of the defendants in this case, filed a motion to require plaintiff to produce for inspection, certain documents, including reports of the Federal Bureau of Investigation, correspondence, etc., with various persons, all as stated in said motion, which is made part hereof. Similar motions were filed by the other defendants. * * *

" * * * Subsequently, the matter was, on February 21, 1949, reset for hearing on March 11, 1949, at which time, having heard further arguments, it was ordered that the Government produce the documents requested by The Ohio Oil Company 'with the right to submit to the Court for ruling any documents they desired to claim to be privileged.'

"On May 10, 1949, plaintiff filed a motion to vacate said order of March 11, 1949, and on June 15, following, it was heard and defendants declined to accept the Government's offer of partial compliance by filing an abstract of factual information contained in the reports of the Federal Bureau of Investigation, and the Court indictaed its purpose

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to adhere to the ruling requiring the Government to produce the documents. At this time counsel for the Government requested time to contact the Attorney General, before the Court finally ruled on the said motion to vacate, which was granted, and on the following day, June 16, 1949, when the hearing was resumed and the Court denied the said motion to vacate, counsel for the Government was given additional time to consult with the Attorney General as to whether the Court's order to produce would be complied with, and the question of what was to be done in case of refusal was reset for July 7, 1949.

"On the last mentioned date, counsel for the Government appeared and submitted further authorities as to the right of the Attorney General to claim and for himself determine the question of privilege as to the documents called for in the motions to produce. Thereupon, after considering said cases, the Court stated from the Bench that to sustain this contention, would in effect, amount to an abdication of the Court's duty to decide the matter and leave it entirely in the hands of the Attorney General; that if the documents were submitted to the Court, with such claims as to privilege as the Attorney General desired to make, they would be considered and if it appeared, in the Court's judgment, that production of any part thereof would be injurious to public interest, they would be excluded; otherwise, the order to produce for the inspection of defendants would be sustained. This, having been declined, counsel was told that a reasonable time would be allowed for further consideration, and the latter, stating no additional time was desired, the Court announced that the

only course left was to dismiss the complaint for failure to comply with its orders."

POINT IN ISSUE

The Record in this cause discloses beyond per adventure that there is one and only one question presented upon this appeal and that concerns the right (vel non) of the Attorney General to withdraw any and all documents and materials contained in the files of his office beyond the reach of discovery in an action in which the government is plaintiff upon his simple declaration or fiat that the papers sought to be obtained (regardless of their nature) must be regarded by the Court as privileged.

The precise position assumed by the government with regard to the authority of the District Court in respect to the orders mentioned is set forth in the affidavit attached to its "motion to vacate" (R 162), from which we quote the following:

"Tom C. Clark, being duly sworn, deposes and says:

1. That he is the Attorney General of the United States, and has his office and place of residence in Washington, D. C.;

2. That he has been informed by his assistants in the Antitrust Division of the Department of Justice that this Court entered an order in the above entitled action on March 11, 1949, requiring the production for examination and inspection by the Court of certain reports made by agents of the Federal Bureau of Investigation to the Attorney General relating to the subject matter of the above

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entitled action, in the course of their investigation of this case;

3. That the inspection by the Court of the said reports is for the purpose of affording the Court an opportunity to determine whether a claim of privilege by the Attorney General is well taken or whether, in the opinion of the Court, the reports should be made available to the defendants for inspection and copying;

4. That for the reasons hereinafter set forth deponent has instructed his assistants in the Antitrust Division to move the Court to vacate the said order and deny the Motion to Produce;

* * *

6. That as Chief Executive of the Department of Justice, your deponent respectfully suggests to the Court that it is exclusively within the exercise of the judgment of the Attorney General to determine whether or not the reports and correspondence sought to be examined are privileged; that this prerogative derives from the Constitution of the United States and is in no way affected or changed by the Rules of Civil Procedure Relating to Discovery, particularly Rule 34; that under the authority of R. S. 161 (5 U. S. C. A. 22) (a copy of which is attached hereto and made a part hereof as Exhibit A) the heads of the Executive Departments of the Government are authorized to determine which documents of their departments are to be considered confidential and not subject to disclosure."

As already shown the motion to produce was allowed "with the right" (reserved to plaintiff) "to submit to the Court for ruling any documents they desired to

claim to be privileged" and solely and only upon the condition "that if the documents were submitted to the Court, with such claims as to privilege as the Attorney General desired to make, they would be considered and if it appeared, in the Court's judgment, that production of any part thereof would be injurious to public interest, they would be excluded." But the government being unwilling to submit the question of privilege in respect to any particular documents or reports for decision of that question by the Court refrained from filing any request for protective orders (with regard to particular matters) as permitted by Rule 30 (b) and stood solely and absolutely upon its position (as set forth in the motion to vacate) "that it is exclusively within the exercise of the judgment of the Attorney General to determine whether or not the reports and correspondence sought to be examined are privileged."

THE QUESTION OF THE ADEQUACY OF THE SHOWING OF GOOD CAUSE FOR PRODUCTION MADE IN THE TRIAL COURT WAS NOT RAISED THERE AND CANNOT BE INJECTED AS AN ISSUE ON APPEAL.

It seems that the government would now like to assert (for the first time) upon appeal that the showing of good cause which accompanied The Ohio Oil Company's motion to produce was somehow insufficient or inadequate in substance.

Assignment No. 6 of the assignment of errors is:

"The court erred in granting defendants'

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motion for the production of aforesaid documents in that they were not designated, nor was good cause shown, as required by Rule 34, Federal Rules of Civil Procedure."

(R 223)

But nevertheless a careful search of the entire Record fails to reveal that the government at any time made any objection based upon either point referred to. The sole and only objection made to any order connected with the motion was set forth in the so-called "motion to vacate" (quoted above) which directly and unmistakably sets forth that the single contention of the government (which was asserted throughout as an absolute obstacle to any discovery regardless of the form employed or reason therefor) was "that it is exclusively within the exercise of the judgment of the Attorney General to determine whether or not the reports and correspondence sought to be examined are privileged."

The objection was precise and specific and when an objection is so made it is to be confined on appeal to the objection expressly stated.[2]

Although the present Rules of Civil Procedure (Rule 46) dispense with any necessity of formal exceptions to rulings or orders of the court, it is expressly provided that "for all purposes for which an exception has heretofore been necessary it is sufficient that a party, *at the time the ruling or order of the court is made* or sought,

---

2. See *Howard Stebbins v. Maria L. Duncan*, 108 U. S. 32; 27 L. ed. 641 and also *Johnston v. Reily*, 160, F. (2d) 249.

makes known to the court the action which he desires the court to take or *his objection to the action of the court* and *his grounds therefor.*" (Emphasis Ours)

The requirement that objection be made at the time of ruling and that the court then be informed of the grounds therefor is merely in recognition of the established practice which prevents one from urging on appeal that any ruling was made in error when the objection thereto was not so called to the attention of the Trial Court.[3]

> "* * This practice is founded upon considerations of fairness to the court and to the parties and of the public interest in bringing litigation to an end after fair opportunity has been afforded to present all issues of law and fact. * *"
>
> *United States of America*
> *v. Ray Keith Atkinson;*
> *297 U. S. 157.*

> "* * Parties may not rest content with the procedure of a trial, saving general exceptions to be made the basis of error proceedings, when they might have had all they were entitled to by the action of the trial court had its attention been seasonably called to the matter."
>
> *Pennsylvania Railroad Company*
> *v. James H. Minds; 250 U. S. 368.*

> "* * The reason for the rule is the broad one that a defect found lurking in the record on

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3. For application of rule in respect to a pre-trial order, see *Fowler v. Crown-Zellerbach Corporation;* 163 F. (2d) 773.

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appeal may not be allowed to defeat recovery, where the defect might have been remedied, if the objection had been seasonably raised in the trial court."

George W. McCandless v. Maxime H. Furlaud; 293 U. S. 67.

"An assignment of errors cannot be availed of to import questions into a cause which the record does not show were raised and passed on in the court below, * *."

Missouri Pacific Railway Company v. Mary Fitzgerald; 160 U. S. 556.

In this case the moving party did make a showing of cause for the production of documents which accompanied that motion, and the Record reveals that the government either conceded the showing to be sufficient or otherwise then, deeming its contention with respect to the asserted prerogative of the Attorney General to be conclusive, elected to rely upon and to present that single question. We shall later refer to statements made in the government brief in connection with the dissertation relating to showing good cause and have referred to the matter at this point only to show that the question was not raised or passed upon in the court below and for that reason cannot be considered on this appeal.

In this same connection there is some reference in the government brief to the fact that there was an offer to furnish defendants with partial excerpts selected from certain papers and documents among those in the files of the Department of Justice, the contents of which (to

that extent) the Attorney General was willing to divulge. — Yet even this ersatz offer was made upon the condition that the Attorney General remain the final arbiter of what was to be supplied and the manner in which it would be furnished — *even for the Court's inspection.*

The so-called alternative offer was in fact an ultimatum that defendants accept what information the government was willing to supply in the manner tendered or go entirely without. The statement made (by counsel) to the Court was:

> "Since I was here before I have gone into these records very thoroughly, and I have made a summary and analysis covering parts and portions of the record that I made from the originals themselves, and I think that is the practical manner to handle it, and you will be able to go through it much faster because I refer to it by paragraph and page, and discuss it in my analysis. These exhibits you can read, and they will assist you in determining whether or not the defendant should be entitled to the official records themselves. I offer that to the Court, but I cannot, and I have not been authorized by the Attorney General, but, on the contrary, have been ordered by him to refuse to surrender the official reports themselves, even though, I frankly state to your Honor, I have them in my possession here.
>
> "The Court: Well, the situation is that I am confronted with the problem of determining whether I shall order these records produced and given to the defendant, or whether the Attorney General shall decide the matter. That is what I am confronted with.

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"Mr. Britt: That is it exactly."
(R 216)

The allowance of an order for the production of papers and documents and the manner in which any such order is to be complied with are matters within the discretion of the Trial Court (Rule 30 (b)[4] , but in this instance there was no appeal to the discretion of the Court because the nature of the offer was to remain fixed and determined (absolutely) by the decision of the Attorney General.

Matters within the discretion of a Trial Court are seldom reviewable on appeal, and we can imagine no instance in which a matter within the discretion of the Trial Judge will be considered on appeal in the absence of any request or opportunity for the exercise of discretion in respect thereto.

In this case no objection was made to the failure of the Trial Judge to rule in any manner in respect to the so-called alternative offer because he was not asked to do so, and the matter was not again mentioned until the reference appearing in the brief herein. There is no objection in the Record or assignment of error relating thereto and the matter is not properly before the Court in any sense.

ASSIGNMENT OF ERRORS

(R 222)

The errors assigned (other than assignment

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4. See *Hickman v. Taylor*, 329 U. S. 495; 91 L. ed. 451.

No. 6 referred to above as not properly before the Court) are set forth in substance[5] in assignments Nos. 1 and 2 as follows:

> "1. The court erred in dismissing the complaint for the failure of plaintiff to produce for inspection reports of the Federal Bureau of Investigation during the period from February 1, 1946 to June 17, 1947 and all correspondence of the Department of Justice during the period from August 1, 1945 to June 17, 1947, relating to the subject matter of this action.
>
> "2. The court erred in granting defendants' motion for the production of the aforesaid documents, as more particularly set forth in said motion, notwithstanding the affidavits of the Attorney General that these documents are privileged and confidential in the public interest."

Attention is directed to the fact that the assignments made by appellant include no assertion that it was error to dismiss the complaint because of the refusal of plaintiff to submit the documents sought to be obtained to the Court for determination of the question of right to claim privilege in respect thereto. Assignment No. 1 is the only assignment in which the dismissal of the action is mentioned and that assignment presents no such contention. We, consequently, conclude that the government concedes that there was no error in the order for

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5. Assignments Nos. 3 and 4 merely divide the import of assignment No. 2 to cause the same to apply separately to the F.B.I. reports sought and then to letters, telegrams, etc., and assignment No. 5 merely recites the asserted legal sources of the position assumed in that assignment.

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dismissal if the matter of privilege is properly to be determined by the Court.[6]

The same idea is emphasized by assignment No. 2 in which there is no reference to the protective qualifications of the order actually rendered (which is totally ignored throughout the entire assignment), and again the order to produce is treated as though it were not restricted to those documents (only) with regard to which "the production of any part thereof" would not be injurious to public interest.

It remains that the sole contention made by appellant upon this appeal is that in each and every instance and under all circumstances "it is exclusively within the the exercise of the judgment of the Attorney General" to determine whether or not any paper or document contained in the files of the Department of Justice is to be regarded as "privileged" within the meaning of Rule 34, and as such not subject to discovery. In other words, that no paper or document known to exist in the files of the Department of Justice may be reached through any process of discovery should the Attorney General choose merely to assert (regardless of cause) that the same is "privileged."

The statement of points to be relied upon in this case merely adopts the points contained in the as-

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[6] Apparently the position is that since (as contended) the question of privilege is to be determined exclusively by the Attorney General, the protective qualifications attached to the order to produce as rendered in this case were without effect and that the order remained as though no qualifications had been attached thereto.

signment of errors, and the Court will consider nothing but the points of law so stated.[7]

SUMMARY OF ARGUMENT

The appellees, on whose behalf this brief is filed, contend in substance:

That in an action brought by the government to restrain alleged violations of the Sherman Act, the government is given the option either to reveal all evidence not properly privileged upon adequate ground of public policy (within its control) which bears upon the charges made, or to let the offense go unrestrained;

That it is as much or more in the public interest that justice be done toward persons accused of violating our Antitrust statutes as it is to preserve secrecy in respect to the housekeeping records of the government;

That the propriety of introducing any paper into a case as testimony or as a means of discovery in any case in which the government is the complainant must depend on the character of the paper and not on the character of the person who holds it;

That it has been the policy of our Courts to treat the government when appearing as a litigant like any private individual;

That both principle and policy demand that

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7. Rule 13 of the rules of this Court.

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the determination of the question of privilege in respect to any paper or document within government control shall be for the Court; and

The government, through the Attorney General, should not be heard to complain of an order directing the production of documents contained in the files of the Department of Justice to permit the Court to determine whether in the best public interest information therein should be disclosed when the regulations of that Department expressly provide for such inspection.

ARGUMENT

Several years before the effective date of the new rules Mr. Justice Cardozo made this observation:

> "The law of discovery has been invested at times with unnecessary mystery. There are few fields where considerations of practical convenience should play a larger role."[8]

THE RULES OF CIVIL PROCEDURE EXCEPT WHERE SPECIFIC EXCEPTION IS MADE APPLY TO THE GOVERNMENT OF THE UNITED STATES AS THOUGH IT WERE ANY OTHER LITIGANT.

With regard to the intent of those who drafted the present federal discovery rules, Judge Charles Clark has stated:

> "***It was our theory except as we made

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8. Sinclair Refining Company v. Jenkins Petroleum Process Company 289 U. S. 689; 77 L. Ed. 1449.

special provisions these rules apply to the United States as a litigant as much as to anyone else."[9]

It has been authoritatively stated that "it ought to be unnecessary to say" that the Rules of Civil Procedure apply to appeals by the government as well as to those by other litigants and that there is no exception even in an antitrust case.

United States of America v. Yellow Cab Company Decision of December 5, 1949, 94 L. Ed. (Adv. Sheet No. 3) page 123.

It consequently seems that it must follow that those rules which expressly "govern the procedure in the United States District Courts in all suits of a civil nature"[10] apply in all actions brought by the government in all respects thereof, including the provisions relating to discovery, and it has been so held as to antitrust actions.[11]

"That it was not intended to exempt the United States from the operation of Rule 33 is conclusively shown, it seems to me, by the provisions of Rule 37. * * In paragraph (f) of the said Rule 37, it is provided that expenses and attorneys fees are not to be imposed on the United States under

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9. American Bar Association, Proceedings of the Federal Rules Institute at Washington, D. C. p. 49. Attorney General William D. Mitchell spoke to the same effect, *ibid.* p. 333.

10. Rule 1.

11. For similar decisions in other type cases see *Bowles v. Ackermen*, 4 *F. R. D.* 260, 262 (*S.D.N.Y.* 1945; *Flemming v. Bernardi*, 4 F. R. D. 270, 271 (*N.D. Ohio*, 1941); *United States v. American Solvents & Chemical Corp. of California*, 30 *F. Supp.* 107 (*D.C. Del.*, 1939); *Brewer v. Hassett*, 2 *F. R. D.* 222 (*D.C. Mass.*, 1942); and *Walling v. Richmond Screw Anchor Company* (*E.D.N.Y.*, 1943) 7 *F. R. S. pg.* 587.

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this rule. If Rule 33 is not applicable to the United States paragraph (f) would have been omitted, or it would have been expressly stated that the United States was not subject to Rule 33.

"And that the rules generally apply to the United States is shown by the provision of Rule 12 extending the time within which the United States may plead."

United States v. General Motors Corporation; 2 F. R. D. 528 (530).

To the same effect see article by Pike and Fischer, *56 Harvard L. R., page 1125*, in which it is observed that "the provision of appropriate trial-preparation procedural steps for all litigants seems well within the authority of the Supreme Court under the enabling act,[12] regardless of the former practice."

Policy supports the same view.

"It has been the policy of the American as well as of the English courts to treat the government when appearing as a litigant like any private individual. Any other practice would strike at the personal responsibility of governmental agencies which is at the base of our institutions."

Bank Line v. United States 163 F. (2d) 133 (138).

It would also seem in principle that when the government or any agency or department thereof resorts to the courts to obtain judicial relief it must submit to the

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12. 28 U.S.C. 723 b and 723 c. See *Sibbach v. Wilson & Company, Inc.*, 312 U. S. pg. 1.

same rules which govern its adversaries. It must as stated by Lord Brougham with reference to a foreign sovereign "be content with the common fare of the Court."

King of Spain vs. Hullett
7 Bligh N. S. 359 (1833).[13]

Among the numerous decisions relating to the question of governmental privilege with which we are concerned, we have found none in which the government has successfully contended that it was not generally subject to the provisions of the rules relating to discovery, and no such contention has been suggested in this proceeding. It follows that the government was compelled to make disclosure of all papers and documents described in the motion to produce filed herein if "not privileged" within the meaning of Rule 34 or suffer the consequences.

ALL CLAIMS TO GOVERNMENTAL PRIVILEGE WHICH MAY BE ASSERTED IN ACTIONS TO WHICH THE GOVERNMENT IS A PARTY DEPEND UPON PUBLIC POLICY WHICH ALSO REQUIRES A FULL AND FAIR DISCLOSURE OF ALL EVIDENCE RELEVANT TO THE ISSUES IN DISPUTE.

In the case of *Bank Line v. United States* (libel by Bank Line, Limited, wherein the United States filed a cross-libel) application was made for relief author-

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13. Compare: *Guaranty Trust Company of New York v. United States of America*, 304 U. S. 126;
United States v. The Thekla, 266 U. S. 328, 340, 341;
United States v. Stinson, 197 U. S., 200, 205.

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ized by the admiralty rules because of the failure of the United States to comply with the order of the District Court to submit for inspection and copying certain records of a naval inquiry at Casablanca. The government disclaimed any considerations of military security as a reason for its unwillingness to disclose, but maintained that the publicity which would result from the order would greatly hamper and impede orderly administration.

In considering the government's contention in the case (reported in *76 F. Supp. 801)*, Judge Rifkind said:

> "It seems to me that two public interests are here in conflict. The first is that justice shall be done between litigants. The conflicting interest is that asserted by the government in the secrecy of its housekeeping records. That the latter public interest exists the courts are not privileged to question. Which policy is to prevail?"

To the same effect see article styled: *Evidentiary Privileges Against the Production of Data Within the Control of Executive Departments; Vol. 3, Vanderbilt Law Review, pg. 73.*

These interests referred to by Judge Rifkind as conflicting are analyzed and evaluated by Dean Wigmore in the following language:

> "It is urged, to be sure (as in Beatson v. Skene), that the 'public interest must be considered paramount to the individual interest of a suitor in a court of justice.' As if the public interest were not involved in the administration of justice! As

if the denial of justice to a single suitor were not as much a public injury as is the disclosure of any official record! When justice is at stake, the appeal to the necessities of the public interest on the other side is of no superior weight. 'Necessity,' as Joshua Evans said, 'is always a suspicious argument, and never wanting to the worst of causes.'

"What is the necessity for secrecy in such matters? To justify a privilege, it must be, on settled principles (ante, §§ 2192, 2285), a secrecy indispensable to induce freedom of official communication or efficacy in the transaction of official business, and it must further be a secrecy which has remained and would have remained inviolable but for this compulsory disclosure. In how many transactions of official business is there ordinarily such a secrecy? After guaranteeing to official communications and acts an immunity from liability to civil or criminal consequences, and after further eliminating those acts and communications which are in no sense secret from their inception, what remains of real and intrinsic secrecy of transaction? If there arises at any time a genuine instance of such otherwise inviolate secrecy, let the necessity of maintaining it be determined upon its merits. But the solemn invocation, in the precedents above chronicled, of a supposed inherent secrecy in all official acts and records, has commonly been only a canting appeal to a fiction. It seems to lend itself naturally to mere sham and evasion."

Wigmore on Evidence
3rd Ed., Vol. 8. §2378a, pg. 790.

We also find in our early history when the liberties guaranteed by the Constitution were uppermost

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in the minds of most that Chief Justice Marshall (in the Burr trials as reported by Brunner) most vividly expressed the public interest in the administration of justice.

> " * * It is not for the court to anticipate the event of the present prosecution. Should it terminate as is expected on the part of the United States, all those who are concerned in it should certainly regret that a paper which the accused believed to be essential to his defense, which may, for aught that now appears, be essential, had been withheld from him. I will not say, that this circumstance would, in any degree, tarnish the reputation of the government; but I will say, that it would justly tarnish the reputation of the court which had given its sanction to its being withheld. Might I be permitted to utter one sentiment, with respect to myself, it would be to deplore, most earnestly, the occasion which should compel me to look back on any part of my official conduct with so much self-reproach as I should feel, could I declare, on the information now possessed, that the accused is not entitled to the letter in question, if it should be really important to him."

The Chief Justice then continued:

> " * * The demand of the orders which have been issued, and which have been, as is alleged, published in the Natchez Gazette, is by no means unusual. Such documents have often been produced in the courts of the United States and the courts of England. If they contain matter interesting to the nation, the concealment of which is required by the public safety, that matter will appear upon the return. If they do not, and are material, they may be exhibited.",

and with regard to the letter first mentioned it was said:

> " * * There is certainly nothing before the court which shows that the letter in question contains any matter the disclosure of which would endanger the public safety. If it does contain such matter, the fact may appear before the disclosure is made. If it does contain any matter which it would be imprudent to disclose, which it is not the wish of the executive to disclose, such matter, if it be not immediately and essentially applicable to the point, will, of course, be suppressed. It is not easy to conceive that so much of the letter as relates to the conduct of the accused can be a subject of delicacy with the president. Everything of this kind, however, will have its due consideration on the return of the subpoena."

25 Fed. Cas. page 37

In order that the public interest in favor of a full and fair disclosure of all evidence relevant to issues in dispute may be subordinated to the public interest in favor of the nondisclosure of State Secrets, it must be made to appear that the latter interest relates to matters which are actually confidential and of a character, the disclosure of which would be injurious to the nation. In discussing this subject in *Walling v. Richmond Screw Anchor Company (7 F. R. S., pg. 587)*, Judge Moscowitz said:

> "This Court refuses to go so far as to decide that any and all records of a governmental agency are of a confidential nature and therefore privileged. It may very well be that in a proper case the Court would direct a governmental agency to disclose a record in its possession. The record must

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really be of a confidential nature, it cannot be merely thought to be such. The claim that it is of a confidential character cannot be based on whim or caprice. The Court is not bound by the claim of privilege unless in fact the records are of a confidential nature or might prove prejudicial to the Government or to the public interest. Then and then only are they privileged."

As stated by Chief Justice Marshall "The propriety of introducing any paper into a case, as testimony, must depend on the character of the paper, not on the character of the person who holds it." *(25 Fed. Cas. page 34.)*

There is no information which could have been obtained by the Department of Justice with regard to the operations conducted at Cotton Valley by the defendants in this case which might be regarded in the light of State Secrets. The project conducted there was one of the very first in the conservation of natural gas and liquid hydrocarbons recoverable therefrom through the recycling of residue gas, and as such was widely publicized from its very beginning. Since the institution of this action its economic and legal phases have been popular subjects for innumerable articles and pamphlets, and the defendants herein (the operators) have been left with the same secrecy or privacy as to the operations conducted as a parlor goldfish. This indubitably is a case of housekeeping only in which there is no public interest in nondisclosure of facts so generally and well known both at home and abroad.

It may be that the two factors of public in-

terest mentioned must be weighed one against the other in each instance wherein claim to privilege is asserted by governmental agency, but certainly there exists no general privilege in favor of the nondisclosure of housekeeping information reflected by papers and documents in departmental files which is paramount to the public interest in the fair and full disclosure of all relevant evidence in the administration of justice in enforcement of governmental regulations.

THE PRINCIPLE OF PRIVILEGE OF NONDISCLOSURE CANNOT BE AVAILED OF BY THE GOVERNMENT IN AN ACTION TO WHICH THE GOVERNMENT IS A PARTY IN INTEREST.

Boske v. Comingore, 177 U. S. 459, 44 L. Ed. 846 and Ex parte *Sackett, 74 F. (2d) 922* are cited most frequently in support of the proposition that assertion of executive privilege must be sustained by the courts. Both cases referred to involved litigation in which the United States was not a party, and we shall not deny the application of the rule of privilege announced in those cases (irrelevant herein) even though the rationale of such decisions has been subjected to impressive criticism[14]. The rule, however, is very different in actions to which the government is a party.

Where disclosure of information in the possession or under the control of a governmental agency is prohibited and a privilege in created (either under specific

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14. Wigmore on Evidence § 2378a, pg. 795.

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federal statutes or under departmental rules promulgated pursuant to 5 U. S. C. A., §22, 2 F. C. A. Title 5, §22) the principle of privilege of nondisclosure cannot be availed of by the government or by its public employees where disclosure is sought in an action in which the government is an actual party in interest.

See Note: *165 A. L. R. 1338, et seq.*

Also: *United States vs General Motors Corporation, 2 F. R. D. 528.*

Bowles vs Ackerman, 4 F. R. D. 260.

United States vs Watkins, 67 F. S. 556.

Fleming vs Bernardi, 4 F. R. D. 270.

Kentucky-Tennessee Light & Power Company vs Nashville Coal Company, 55 F. S. 65.

Walling v. Richmond Screw Anchor Company, 4 F. R. D. 265.

Brewer v. Hassett, 2 F. R. D. 222.

"While we must accept it as lawful for a department of the government to suppress documents, even when they will help determine controversies between third persons, we cannot agree that this should include their suppression in a criminal prosecution, founded upon those very dealings to which the documents relate, and whose criminality

they will, or may, tend to exculpate. So far as they directly touch the criminal dealings, the prosecution necessarily ends any confidential character the documents may possess; it must be conducted in the open, and will lay bare their subject matter. The government must choose; either it must leave the transactions in the obscurity from which a trial will draw them, or it must expose them fully. Nor does it seem to us possible to draw any line between documents whose contents bears directly upon the criminal transactions, and those which may be only indirectly relevant. Not only would such a distinction be extremely difficult to apply in practice, but the same reasons which forbid suppression in one case forbid it in the other, though not, perhaps, quite so imperatively."

United States vs Andolschek,
142 F. (2d) 503 (506).

In the Bank Line case *(76 F. S. 801)* Judge Rifkind, after pointing out that in criminal cases the government is given the option either to reveal all evidence within its control which bears upon the charges made or to let the offense go unpunished and noting that the same rule had been recognized in other types of proceedings, then stated that it was but a short and necessary step to apply the rule in a civil action.

"It seems to me but a short step, and a necessary one, from these premises to the argument that where the government is the complainant in a civil suit for damages it should likewise be required to make its own choice — to resolve on its part which of two conflicting public interests it prefers in any particular instance." (Pg. 803)

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In an earlier decision in a habeas corpus proceeding *(United States v. Watkins, 67 F. Supp. 556)*, Judge Rifkind stated his impression of the theory of waiver as follows:

> " * * Moreover, the theory of waiver upon which the requirement of disclosure has been based seems to me to be the kind of useful fiction which the law invents to express an underlying public policy. That public policy is that a person should not be deprived of his liberty without giving him an opportunity to have access to material which might exculpate him." (Pg. 561)

The term liberty as used in the statement quoted was undoubtedly intended to extend to all liberties guaranteed by the Constitution without restriction and to include the civil liberties of freedom in commercial and industrial effort and the enjoyment of the ownership of property.

Underlying the rule of waiver of privilege in all actions brought by the government is the general principle that public policy forbids the maintenance of any suit which would inevitably lead to the disclosure of matters which the law regards as confidential. An example of the application of this principle appears in *Totten v. United States, 92 U. S. 105, 23 L. Ed. 605* in which the claims of plaintiff for compensation for espionage services rendered during the Civil War under agreement with President Lincoln were denied for reasons stated as follows:

> "It may be stated, as a general principle, that public policy forbids the maintenance of any suit in a court of justice, the trial of which would inevitably lead to the disclosure of matters which the law itself regards as confidential, and respecting which it will not allow the confidence to be violated. On this principle, suits cannot be maintained which would require a disclosure of the confidences of the confessional, or those between husband and wife or of communication by a client to his counsel for professional advise, or of a patient to his physician for a similar purpose. Much greater reason exists for the application of the principle to cases of contract for secret services with the Government, as the existence of a contract of that kind is itself a fact not to be disclosed."

It consequently follows that when the government brings an action in the enforcement of its laws and regulations, it must necessarily have determined to abandon all secrecy and claims to privilege on that account with regard all matters involved in such action and relevant thereto, since a continued claim that the matters involved were State Secrets and privileged from disclosure as such would defeat the action.

Pursuing the idea of waiver of privilege further in the Bank Line case (last referred to) in its application in cases in which the government is defendant, Judge Rifkind said:

> "It is a somewhat longer step to the conclusion that the privilege is surrendered when the government is a party defendant. The government cannot be made a party defendant without

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its consent; and I assume that the government could have annexed to its consent an absolute privilege of non-disclosure of information in its possession. To the extent that it would have made the assertion of some claims against the government futile, it would amount to a constriction of the scope of the government's consent.

"Congress has not here so circumscribed its consent to be sued. 46 U. S. C. A. §§ 741, 742, 743, 781, 782. On the contrary, § 743 directs that the principles of law and the rules of practice obtaining between private parties shall prevail. The consent, being general, amounts to an endorsement of the libel with the sovereign's command 'Soit droit fait al partie'. (Let right be done to the party). But right cannot be done if the government is allowed to suppress the facts in its possession."

Bank Line v. United States
76 F. Supp. 801 (804).

It is very interesting to note (as pointed out by Judge Rifkind) that the Admiralty Act expressly provides (§ 743) that suits under the statute shall be heard according to the rules of practice obtaining in like cases between private parties, and further that the provisions of the Federal Tort Claims Act *(28 U. S. C. § 2671, et seq.)* seem to imply the same intention.

In the enactment of these statutes authorizing actions against the government, Congress might have imposed any conditions which it saw fit in respect to the maintenance of the actions authorized, and the fact that no conditions were imposed to place the government in a favored or preferential position with regard to procedure

in such cases clearly indicates that it was the opinion that as a matter of policy the government as a party litigant should appear in all proceedings maintained in the District Courts of the United States[15] (whether as plaintiff or defendant) upon the same terms as its adversaries.

A CIVIL ACTION TO RESTRAIN ALLEGED VIOLATIONS OF THE SHERMAN ACT IS AT LEAST A QUASI CRIMINAL ACTION IN WHICH THE THEORY OF WAIVER OF PRIVILEGE SHOULD HAVE PARTICULAR APPLICATION.

There is no doubt that punishment by fine may be imposed for violation of the Sherman Act only in a criminal action (see *United States v. National Lead Company, 332 U. S. 319)*, but nevertheless there must be a factual showing of illegality to warrant injunction in a civil proceeding. See *Appalachian Coals, Inc. v. United States of America, 288 U. S. 344.* In either instance the enforcement of a criminal statute is involved and the civil action is at least quasi criminal in character. This idea was most aptly expressed by Mr. Justice Holmes in his dissent in *Northern Securities Co. v. United States, 193 U. S. 197*, which in that respect was not in conflict with the majority opinion of the Court:

> "The statute of which we have to find the meaning is a criminal statute. The two sections on

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15. Compare 28 U. S. C. § 272 relating to discovery in actions maintained in the Court of Claims providing as a special rule in actions pending in that Court that the head of any governmental department "may refuse and omit to comply with any call for information or papers when, in his opinion, such compliance would be injurious to the public interest."

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which the government relies both make certain acts crimes. That is their immediate purpose and that is what they say. It is vain to insist that this is not a criminal proceeding. The words cannot be read one way in a suit which is to end in fine and imprisonment and another way in one which seeks an injunction." (P. 401)

We further direct attention to the similarity of criminal or civil proceedings maintained in the enforcement of the statute which results from the provisions of Section 16 of the Act:

> "A final judgment or decree rendered in any criminal prosecution or in any suit or proceeding in equity brought by or on behalf of the United States under the antitrust laws to the effect that a defendant has violated said laws shall be prima facie evidence against such defendant in any suit or proceeding brought by any other party against such defendant under said laws as to all matters respecting which said judgment or decree would be an estoppel as between the parties thereto: Provided, this section shall not apply to consent judgments or decrees entered before any testimony has been taken."
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> *15 U. S. C. § 16.*

In connection with the theory of waiver of governmental privilege, we direct attention to the fact that all matters of privilege and waiver of privilege are evidentiary and claims of governmental privilege (of the character involved here) are based entirely upon grounds of public policy which oppose the disclosure of Secrets of State which would be injurious to the welfare of the nation.

It, consequently, does not appear that the nature or form of an action to which the government is a party could be material in solving the question of privilege or waiver of privilege, since the nature of the public policy opposing disclosure must always be the same.

It may be contended (upon some basis of argument which we do not comprehend) that the rule of waiver of privilege as announced in the case of *United States vs. Andolschek, 142 F. (2d) 503* is to be restricted in its application to proceedings of a criminal nature, but the criminal and civil proceedings authorized by the Sherman Act are regulatory in nature and maintained in the enforcement of the statute. Since the question of violation of a criminal statute is involved in either event, the same rules in respect to governmental privilege and the waiver thereof should be applicable to the same extent in both forms of action.

QUESTION OF CONSTITUTIONAL STATUTORY AND RULES PROVISIONS.

The fifth assignment of errors in this case is that:

> "5. The court erred in granting defendants' motion for the production of aforesaid documents, as more particularly set forth in said motion, in that it encroached upon the executive's authority under the Constitution and violated Section 161 of the Revised Statutes as implemented by the Attorney General's order of May 2, 1939 made pursuant thereto."
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> *Record pg. 223.*

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There is, however, no constitutional or statutory provisions which lends support to the contention that the determination of the question of privilege in this case is exclusively that of the Attorney General, and it seems that any claim to privilege in this case was waived by the government even under the rules adopted by the Department of Justice.

Mr. Chief Justice Taft (in Ex parte *Grossman, 267 U. S. 87)* pointed out quite plainly that the Constitution does not provide that the different branches of government be kept completely separate and independent of each other:

> "The Federal Constitution no where expressly declares that the three branches of the government shall be kept separate and independdent. All legislative powers are vested in a Congress. The executive power is vested in a President. The judicial power is vested in one Supreme Court and in such inferior courts as Congress may from time to time establish. The judges are given life tenure and a compensation that may not be diminished during their continuance in office, with the evident purpose of securing them and their courts an independence of Congress and the Executive. Complete independence and separation between the three branches, however, are not attained, or intended, as other provisions of the Constitution and the normal operation of government under it easily demonstrate." (119)

The reason underlying the failure to provide a constitutional guaranty of complete separation of the

several branches of government was explained by Mr. Justice Frankfurter in his concurring opinion in *Pennekamp v. Florida (328 U. S. 331)* as follows:

"***No institution in a democracy, either governmental or private, can have absolute power[4]."

(NOTE 4: "That this indispensable condition for a free society was well known to the framers of the Constitution, is the theme of Mr. Justice Brandeis in his dissenting opinion, in Myers v. United States, 272 US 52, 240, at 293, 71 L ed 160, 175, 242, 47 S Ct. 21: 'The doctrine of the separation of powers was adopted by the Convention of 1787, not to promote efficiency but to preclude the exercise of arbitrary power. The purpose was, not to avoid friction, but, by means of the inevitable friction incident to the distribution of the governmental powers among three departments, to save the people from autocracy.' And see Mr. Chief Justice Taft, in Ex parte Grossman, 267 US 87, 119-122, 69 L ed 527, 535, 536, 45 S Ct 332, 38 ALR 131.")

Revised Statutes, paragraph 161, seems to have been adopted in conformity to the scheme of incomplete separation of the authority of the different branches of government, since the head of each depatrment was authorized merely to make regulations "not inconsistent with law."[16] It is, consequently, held that regulations

16. "The head of each department is authorized to prescribe regulations, not inconsistent with law, for the government of his department, the conduct of its officers and clerks, the distribution and performance of its business, and the custody, use, and preservation of the records, papers, and property appertaining to it. (R. S. §161.)" (5 U.S.C. §22).

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adopted pursuant to the provisions of the Revised Statutes do not preclude a court of the United States from ordering discovery of information and materials contained in departmental files when the government is a party to the litigation.

> "But the clear mandate that all executive regulations be 'not inconsistent with law' circumscribes the power of the entity prescribing the regulation under consideration, and operates to make the applicability and enforceability of a specific executive department regulation a judicial question for ultimate decision by the court."
>
> *Zimmerman v. Poindexter*
> *74 F. S. 933 (935).*

See Also: *United States v. Schine Chain Theatres, 4 F. R. D. 108.*

United States v. General Motors Corporation, 2 F .R. D. 528.

In respect to the regulations relating to departmental records adopted by the Department of Justice, we find most interesting the very recent decision (February 24, 1950) rendered by the United States Court of Appeals for the Seventh Circuit in the suit styled *United States of America, ex rel. Touhy v. Joseph E. Ragen*, No. 9916 on the docket of that Court. That suit was a habeas corpus proceeding resulting from the fact that George R. McSwain, Special Agent in charge of the Chicago office of the Federal Bureau of Investigation, was punished for contempt upon his refusal to produce certain records of the F. B. I. pursuant to a subpoena issued in the course

of a criminal proceeding pending in a state court of Cook County, Illinois. In that case McSwain, acting under instructions from the Attorney General, declined to produce the material commanded by the subpoena of the state court, and as justification for such refusal relied upon Department of Justice Order No. 3229 (referred to herein) and *Supplement No. 2 of said order, dated June 6, 1947.* In the course of the opinion rendered, the court stated:

> "Admittedly, the government was not a party to the proceeding out of which the subpoena in the instant matter issued. Did it waive its privilege of non-disclosure in some other manner? This brings us to a consideration of Supplement No. 2 to Order No. 3229 promulgated by the Department of Justice June 6, 1947, directed to all United States Attorneys and entitled 'Procedure to be followed upon receiving a Subpoena Duces Tecum.' The letter of the Attorney General directed to U. S. Attorney Kerner, dated May 25, 1949, among other things stated:
>
> > 'It is the Department's position that it should decline to produce the records in question. It is desired, therefore, that you proceed in accordance with the instructions given in Supplement No. 2 of Order No. 3229. It is requested that you or one of your assistants be present at the hearing on May 31, 1949, in order to represent Special Agent McSwain.'
>
> "The directive so far as here material provides:
>
> > 'Therefore, the officer or employee should, unless directed to the contrary by The Attorney

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> General, bring with him the records and documents which are called for by the subpoena even though the Department takes the position that it is not necessary to produce them. Thus, a subpoena is complied with, although a reason is offered for not actually submitting the documents requested.'

It provides further:

> 'It is not necessary to bring the required documents into the court room and on the witness stand when it is the intention of the officer or employee to comply with the subpoena by submitting the regulation of the Department (Order No. 3229) and explaining that he is not permitted to show the files.'

"Immediately following that which we have just quoted is a statement which while somewhat confusing and ambiguous appears to amount to a contraction of the unlimited privilege otherwise possessed by the Department of Justice. The directive provides:[17]

> 'If questioned, the officer or employee should state that the material is at hand and can be submitted to the court for determination as to its materiality to the case and whether in the best public interests the information should be disclosed. The records should be kept in the United States Attorney's office or some similar place of safekeeping near the court room. Under no circumstances should the name of any confidential informant be divulged.'

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17. The Courts of the United States take judicial notice of the rules and regulations of the executive departments of the government prescribed by authority of law. See *Anton Caha v. United States* 152 U. S. 211, 38 L. ed. 415.

> Certainly this language contemplates some circumstances when the material called for must be submitted 'to the court for determination as to its materiality to the case and whether in the best public interests the information should be disclosed.' The challenging question is, what are the circumstances under which submission must be made? It appears that the officer or employee is only required to do so 'if questioned'. We construe those words to mean that the material called for must be submitted to the court for the limited purpose stated if the person under subpoena is requested to do so. Conversely stated, it means that submission is not required in the absence of a request by the court or opposing counsel that it be made. And the directive to submit under the circumstances stated is to that extent a waiver by the Department of Justice of its non-production privilege."

In this case counsel for the government, who admitted that he had in his possession all information and documents involved, was questioned at length by the Court with regard to the attitude of the Department of Justice in respect thereto (R 205, et seq.), which colloquy may be said to have terminated by the following statement of counsel:

> "Mr. Britt: I am perfectly willing for the time to start now, if you Honor pleases. I have them here, and I still refuse to produce them."

Record, pg. 218

We submit that Supplement No. 2 of Order No. 3229 promulgated by the Department of Justice on June 6, 1947, is applicable here, and that under the cir-

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cumstances described, there was a complete waiver to any claim of non-production privilege even under the express terms of the order mentioned.

THE DETERMINATION OF THE QUESTION OF PRIVILEGE IN RESPECT TO ANY PAPER OR DOCUMENT WITHIN GOVERNMENTAL CONTROL IS FOR THE COURT.

In the case of *United States v. Klein, 13 Wall. 128, 20 L. ed. 519*, it was held that not even the legislative branch of government could prescribe rules of decision to the judicial department in cases pending before it, although attempted through act of Congress. With reference to the statute in question in that case, the Court said:

> "The court is required to ascertain the existence of certain facts and thereupon to declare that its jurisdiction on appeal has ceased, by dismissing the bill. What is this but to prescribe a rule for the decision of a cause in a particular way? In the case before us, the court of claims has rendered judgment for the claimant and an appeal has been taken to this court. We are directed to dismiss the appeal, if we find that the judgment must be affirmed, because of a pardon granted to the intestate of the claimants. Can we do so without allowing one party to the controversy to decide it in its own favor? Can we do so without allowing that the legislature may prescribe rules of decision to the judicial department of the government in cases pending before it?"

In *United States v. Radio Corporation of America 46 F. S. 654*, it was stated as a matter of principle based upon the authority cited therein that:

> "***It is fundamental to our form of government that in such suits,[18] as in all other matters brought before them for judicial action, the courts must act 'in accordance with their own convictions, uninfluenced by the opinions of any and every other department of the Government.' Irvine v. Marshall, 61 U. S. 558, 567, 20 How. 558, 15 L. Ed. 994."

Vague reference has been made by the government in this proceeding to the decision rendered in *Marbury v. Madison (1 Cr. 137)* as though there might be something in the opinion in that case from which it might find solace. We submit, however, that it is implicit in that decision that the determination of all evidentiary questions of privilege (including such as that involved here) is for the Court and as a fair statement of that case, we quote here the synopsis thereof appearing in *Wigmore on Evidence, 3rd Ed., § 2378, Note 8, pg. 787:*

> "***Marbury v. Madison, 1 Cr. 137, 143 (mandamus to the Secretary of State to deliver commissions to justices of the peace; the commissions were alleged to have been duly made out and sealed, but unlawfully withheld; clerks of the department of State being summoned to prove the fact, they claimed a privilege not to disclose the transactions of the office, and the Attorney-General being summoned for the same purpose made the same claim; held that they must answer, the facts not being confidential; the Court said, 'they had no doubt he ought to answer; there was nothing confidential required to be disclosed. If there had been, he was not required to answer it . . . . But

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18. Antitrust actions.

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> the fact whether such commissions had been in the office or not could not be a confidential fact; it is a fact which all the world have a right to know'; * *."

We state that it appears from that decision that the determination of the question of privilege presented was regarded as a question for the Court because the Court did actually decide it. The Attorney General claimed privilege, but there was no contention that he had any right to determine that question which was treated strictly as a matter for the Court. In the trials of Aaron Burr (supra) the matter was treated in precisely the same fashion and from those precedents it seems that the highest authority in this country has at all times considered the determination of the question to be within the inherent function of the Court.

The opinion upon the subject generally is reflected by the following extracts from the authorities referred to:

> "There do not appear to be any federal cases discussing the manner in which the privilege may be claimed by the Government and determined by the court when the United States or an agency or officer thereof is a party. This much seems clear, however: inspection of government documents should be permitted, unless the court is satisfied that it would be against public policy to do so. Rules of Court in England (The Annual Practice (1938) O. 31, r. 19a (2) and in Australia (Robinson v. Australia (1931) W. N. 147, P. C.) authorize the court to inspect government documents in order to determine the validity of a claim of privilege.

And these rules of court apparently include a claim of privilege by a minister of state to the production of a document on the ground of public policy. Robinson v. Australia (1931) W. N. 147, P. C. In the report of that case there appears the following statement: 'The fact that production of the documents in the particular litigation would prejudice the Crown's own case did not justify any claim of privilege: see Esquimault and Nanaimo Railway Co. v. Wilson, (1920) A. C. 358, 366. Their Lordships agreed with the view of Griffith C. J. in Marconi's Wireless Telegraph Co. v. The Commonwealth, (1913) 16 C. L. R. 178, that the Court has always had in reserve the power to inquire into the nature of the document, and to require some indication of the nature of the injury to the State which would follow its production. At the time of Beatson v. Skeere, (1860) 5 H. & N. 838, any examination of the document would have had to be in public; that was the reason for accepting the Minister's word without making any examination."

Moore's Federal Practice
Vol. 2, § 34.05, pg. 2642.

"The truth cannot be escaped that a Court which abdicates its inherent function of determining the facts upon which the admissibility of evidence depends will furnish to bureaucratic officials too ample opportunities for abusing the privilege. The lawful limits of the privilege are extensible beyond any control, if its applicability is left to the determination of the very official whose interest it may be to shield a wrongdoing under the privilege. Both principle and policy demand that the determination of the privilege shall be for the Court; and

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this has been insisted upon by the highest judicial personages both in England and the United States: * *."

Wigmore on Evidence
3rd Ed., § 2379, pg. 799.

To the same effect see:

Bank Line v. United States
163 F. (2d) 133.

Crosby v. Pacific S. S. Lines
133 F. (2d) 470.

Walling v. Richmond Screw Anchor Company
7 F. R. S., pg. 587

Zimmerman v. Poindexter
74 F. S. 933.

O'Neill v. United States
79 F. S. 827.

Article by Pike and Fischer,
56 Harvard L. R., pg. 1125.

Article by William V. Sanford,
3 Vanderbilt L. R., pg. 73.

When the government through the head of any department thereof resorts to a court of the United States to obtain judicial relief, it must do so in accordance with the rules of law and practice prevailing in that Court, and it is the fundamental and inherent duty of the court to determine all questions of law and practice presented in the course of such proceeding, otherwise the inherent function of the court is abdicated.

CONCLUSION

The order rendered herein pursuant to defendants' motion to produce was rendered in precise conformity to the provisions of Rule 34 of the Rules of Civil Procedure with adequate provision for the protection of all designated papers and documents which might be deemed by the Court to be of a privileged nature. The order not only conforms precisely to the express provisions of the rule mentioned, but also conforms to the regulation of the Department of Justice dealing with the behavior of the officers and employees of that department as evidenced by Supplement No. 2 to Order No. 3229 issued on June 6, 1947.[19]

If the head of any department of government might, — by an arbitrary claim of privilege therefor — withdraw any and all information not actually of a privileged nature (existing in his possession) from the reach of discovery under the provisions of Rules 26 to 37, inclusive, of the Rules of Civil Procedure, then the government would in effect be no longer subject to the rules relating to discovery, since those rules could not be enforced without the consent of the head of the department. Supplement No. 2 to Order No. 3229 was undoubtedly an acknowledgment of that fact and an acquiescence in the inherent function of the courts of the United States to de-

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19. Understood to have been promulgated to avoid conflict with decisions such as those rendered in *United States v. Andolschek*, 142 F. (2d) 503 and *United States v. Krulewitch*, 145 F. (2d) 76.

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termine the question of privilege in all cases in which the government is a party in interest.

For the foregoing reasons, the order for dismissal should be affirmed.

Respectfully submitted,

SIDNEY M. COOK,
1500 Commercial National Bank Building,
Shreveport, Louisiana.
CHARLES D. EGAN,
1500 Commercial National Bank Building,
Shreveport, Louisiana.
COUNSEL FOR COTTON VALLEY OPERATORS' COMMITTEE.

DAVID E. SMITHERMAN,
Commercial National Bank Building,
Shreveport, Louisiana.
COUNSEL FOR NORTH AMERICAN OIL CONSOLIDATED, ROOT PETROLEUM COMPANY, JABCO, INC., A. J. HODGES, M. H. MARR, W. G. RAY, DANIEL W. STEWART, E. L. STEWART, FRANK B. TREAT AND W. C. WOOLF.

J. RALPH GOFF,
Arcadia, Louisiana.
COUNSEL FOR HUNT OIL COMPANY, ROY LEE, TRUSTEE FOR HASSIE HUNT TRUST, AND H. L. HUNT.

JOHN M. MADISON,
1525 Slattery Building,
Shreveport, Louisiana.
W. SCOTT WILKINSON,
1525 Slattery Building,
Shreveport, Louisiana.

C. HUFFMAN LEWIS,
1525 Slattery Building,
Shreveport, Louisiana.

COUNSEL FOR A. G. OLIPHANT, ALLENE OLIPHANT, CHARLES W. OLIPHANT, H. W. PERRITT, E. V. WHITWELL, SUNRAY OIL CORPORATION, UNION PRODUCING COMPANY AND W. A. DELANEY, JR.

JOHN T. GUYTON,
Commercial National Bank Building,
Shreveport, Louisiana.

COUNSEL FOR UNION PRODUCING COMPANY.

A. W. TRICE,
Ada, Oklahoma.

COUNSEL FOR W. A. DELANEY, JR.

H. F. ABY,
National Bank of Tulsa Building,
Tulsa, Oklahoma.
LESLIE MOSES,
Continental American Bank Building,
Shreveport, Louisiana.

COUNSEL FOR MID-STATES OIL CORPORATION.

A. M. GEE,
539 South Main Street,
Findlay, Ohio.
C. F. CURRIER,
Commercial National Bank Building,
Shreveport, Louisiana.
LEON O'QUIN,
424 First National Bank Building,
Shreveport, Louisiana.
ARTHUR O'QUIN,
424 First National Bank Building,
Shreveport, Louisiana.

COUNSEL FOR THE OHIO OIL COMPANY.

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APPENDIX

APPELLANT'S ARGUMENTS WITH REGARD TO GOOD CAUSE, ETC.

Although we think it quite plain (as heretofore shown) that the question of the adequacy of the showing made in support of The Ohio Oil Company's motion for the production of documents (not raised in the Trial Court) is not before the Court on this appeal, we shall again briefly refer to that question to show that it obviously formed no part of and was unrelated to the government's sole and only contention.

The arguments advanced in appellant's brief might have been appropriate if they had been addressed to the Trial Judge, but are actually inconsistent with the position assumed in the Court below.

In connection with those arguments, we wish to point out that the statement of "the discovery proceedings in the Trial Court" as set forth at pages 8 and 9 of appellant's brief might misleadingly give the impression that the motion for the production of documents filed on behalf of The Ohio Oil Company[20] was filed after Magnolia Petroleum Company had been furnished with certain information[21] in response to interrogatories propounded by that Company. In fact (so far as we know) no party to the proceeding, other than Magnolia Petroleum Company, had any knowledge of the information contain-

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20. Filed October 25, 1947. R 33.

21. Furnished on May 13, 1949. R 165.

ed in the answers referred to until furnished with a printed copy of the Record herein.

Whatever arguments may be advanced in respect to the background which existed in the Court below, the Record and the findings of fact as set forth in the order for dismissal must control, and those findings of fact by the Trial Judge (and the Record) show beyond any doubt that no question of the inadequacy or insufficiency of the showing of cause for production was ever urged. Such a position would have been — and is now — inconsistent with the contention of executive control of the matter of privilege, since the former admits the existence of documents subject to discovery and the latter is in complete denial thereof. This inconsistency we believe fully explains why only the one contention was made in the Trial Court for at that time counsel had only the one contention in mind.

Any showing of cause for the production of documents presents a factual situation for determination in the discretion of the Trial Court[22] no different from any other matter within that discretion. Counsel for the government apparently argue that the remarks made in *Hickman v. Taylor* in respect to good cause for production of the documents and information sought under the extraordinary facts of that case should be the measure of a showing of cause in all cases, but certainly the nature of the showing must depend upon the facts and circumstances

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22. Hickman v. Taylor, 329 U. S. 495; 91 L. ed 451.

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of each particular case and in each instance the Trial Judge is to determine the sufficiency of the showing made.

As stated by Judge Kalodner:

> "What constitutes good cause is a difficult question. The elements are suggested in 2 Moore's Federal Practice, § 34.04. A liberal construction is, of course, desirable. United States v. Doudera, D. C. E. D. N. Y. 1939, 28 F. Supp. 223. Considerations of practical convenience are of importance. So also, the Court should be satisfied that production of the requested document is necessary to enable a party to prepare his case, or will facilitate proof or progress at the trial. These must be the considerations, at least, given prominence by the Court. In the long run, whether the order to produce a particular document will be granted is a matter for the exercise of the Court's discretion, and the attempted statement of a rule results only in diminishing the desired flexibility of the Civil Rules. See 2 Moore's Federal Practice, § 26.12 (as amended in the 1945 Cumulative Supplement, and see note 15 therein). It is sufficient guidance to keep in mind the liberal objectives of the Civil Rules."
>
> *Gordon v. Pennsylvania R. Co., (E. D. Penn. 1946) 5 F. R. D. 510.*

In this case the Judge considered the showing made to be adequate, and in the absence of objection directed to the sufficiency of that showing in the Court below, the matter was then concluded.

We also wish to point out that the argument — that the documents which were sought were of a nature

subject to claim of privilege as the "work product" of a lawyer — likewise relates to a matter not raised in the Trial Court and totally inconsistent with the claim of general privilege.

If the government had desired to claim that any portion of the documents sought were privileged as the work product of a lawyer, that claim would have been presented through a motion made in accordance with Rule 30 (b) supported by a showing of "good cause" for privilege as required by the provisions of that rule which would have required a specific showing of the nature of the documents, rather than a mere oral statement or argument with regard thereto.

Not only did the government fail to present any such claim of privilege (by motion or otherwise), but had it done so there would have been an unescapable admission that the claim should be determined by the Court, and that the documents claimed to be privileged on that account should have been presented to the Court for its inspection (when so ordered) to permit determination of the claim.

The point is that the government refused to present anything for the inspection of the Court and made no claim of specific privilege in respect to any particular documents, since such a claim would have conceded the question to be one for judicial determination.

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CHARLES ELMORE CROPLEY
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1949

No. 490

UNITED STATES OF AMERICA,
Appellant,

vs.

COTTON VALLEY OPERATORS COMMITTEE, ET AL.,
Appellees.

MOTION ON BEHALF OF WM. DWIGHT WHITNEY FOR LEAVE TO FILE A BRIEF AS *AMICUS CURIAE* AND FOR FURTHER RELIEF.

WM. DWIGHT WHITNEY,
Counsel.

April 17, 1950

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1949

UNITED STATES OF AMERICA, *Appellant,* *vs.* COTTON VALLEY OPERATORS COMMITTEE, *et al.,* *Appellees.*	No. 490

MOTION ON BEHALF OF WM. DWIGHT WHITNEY FOR LEAVE TO FILE A BRIEF AS *AMICUS CURIAE* AND FOR FURTHER RELIEF.

To the Honorable The Chief Justice of the United States and the Associate Justices of the Supreme Court of the United States:

Now comes WM. DWIGHT WHITNEY and respectfully moves this Court, pursuant to Rule 27 paragraph 9 of the Rules of this Court, for leave (1) to file a brief in this case *amicus curiae,* and (2) in the event of an order for reargument, for leave to participate in the oral argument as *amicus curiae.*

The ground for the application is that the issues are of fundamental constitutional importance, involving the relations between the executive branch of the government, the judicial branch of the government and private parties who are engaged in litigation against the government in civil proceedings in the United States courts.

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The briefs filed in the case on behalf of the various appellees leave the constitutional history open for further development. For example, no reference is made in the briefs for the appellees to the fact that in the other nation sharing our common law traditions—England—the subject has recently been reviewed by Parliament and has resulted in a statutory determination that only in the most extreme case (specifically that in which the Minister in question personally directs his attention to the particular document) shall the executive withhold any document from discovery by a private party in litigation to which the Government is a party. Crown Practices Act, 1947, § 27,[1] when read with the earlier decision in *Duncan* v. *Cammell Laird & Co.* [1942] A. C. 624.

As the government's brief in this case very fairly points out, the *Duncan* case in the House of Lords was, in view of its importance, considered by a court of seven Law Lords (the normal quorum of that court being five). But the gov-

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[1]The Act in its principal portion provides:

"DISCOVERY.—(1) Subject to and in accordance with rules of court and county court rules:—

"(a) in any civil proceedings in the High Court or a county court to which the Crown is a party, the Crown may be required by the court to make discovery of documents and produce documents for inspection; and

"(b) in any such proceedings as aforesaid, the Crown may be required by the court to answer interrogatories:

"Provided that this section shall be without prejudice to any rule of law which authorises or requires the withholding of any document or the refusal to answer any question on the ground that the disclosure of the document or the answering of the question would be injurious to the public interest."

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ernment's brief does not go on to explain the significance of the fact that, although that case was argued at a time when bombs were falling on London, the court, after a most extensive consideration, nonetheless reached the conclusion that there were very narrow limits to the power of the executive to withhold documents from discovery even on grounds of national security.

This Court must undoubtedly be especially reluctant that our country should through any inadvertence either (a) fall behind Great Britain in the protection of the freedom of the citizen from the risk of use of arbitrary power, or (b) approach in its jurisprudence those other nations in which the rule is followed that there is some special quality inherent in the sovereign which entitles it to a special "privilege" to withhold documents from the normal procedure of discovery.

I do not for one moment suggest that the Attorney General, in contending at the bar of this Court for just that *privilege*, has any intention whatsoever to exercise a comparable arbitrary power. But the uses to which the power, once recognized by this Court, may be put, are at least enough (I submit) to require the most earnest and prayerful consideration, as a result of the most thorough research, before such a power be established as the law of our country.[2]

That further research into our own constitutional history is also warranted, is indicated by the brief consideration given in the appellees' briefs to the trial of Aaron Burr, and to other early cases in our history.

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[2]*Duncan* v. *Cammell Laird & Co.* was orally argued before the House of Lords for three days in March 1942. [1942] A.C. at 624.

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Yet the question is one also of current practical significance. In one equity case pending in the Southern District of New York, *United States* v. *Morgan, et al.*, Civil Action No. 43-757, in which your petitioner is interested as counsel for two of the groups of defendants, the government counsel stated within the last month in open court that the Attorney General's office had collected between 100,000 and 200,000 documents, but (unlike the other government counsel in the present case in the Western District of Louisiana) refused to make even a limited disclosure of them, claiming an absolute privilege. There is thus an inconsistent practice on the part of the various representatives of the Attorney General.

Prima facie there is no ground for the withholding of any document. There is no reference in the Federal Rules of Civil Procedure to the government as being in a position in any way different from any other party in a civil action conducted by those rules.

All must no doubt appreciate, however, that even rules of court may occasionally have to bow to considerations of national security. But that they should bow to an assertion of executive "privilege"—a privilege which may, so runs the argument of the government in the present case, be asserted by any of the numerous branches of our government, civilian as well as military— savors of an age from which Chief Justice Marshall thought that we had already emerged in his time, and of judicial practices in a part of the world from which even socialist Britain has been at pains to keep itself free.

* * * * *

I frankly recognize and apologize for the fact that this application comes at a very late date. The reason is that

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the briefs for appellees were only filed in this Court this week. When this Court noted probable jurisdiction in January, I applied at once to the Solicitor General for leave by letter dated January 20 reading as follows:

> "I would be grateful if I might have your consent to my submitting a brief as *amicus curiae* before the Supreme Court in the above case.
>
> "I have discussed the case with various other members of the Supreme Court bar in New York who are interested in the question presented and who have expressed themselves as hopeful that you may afford to me an opportunity to present the views which are held by many of us who have been active in work of this character, but which conflict with the views expressed by the Government.
>
> "As I have not had the privilege of meeting you personally, and my name may not be known to you, I presume to introduce myself as having appeared on behalf of the United States as Assistant Attorney-General in the Anti-Trust Division among others, in the *Trenton Potteries* and *Sisal Sale* cases, and on behalf of defendants, among others, in the *United States Alkali Association, De Beers* and *National Lead* cases."

This application was refused by the Solicitor General under date of January 24. I thereupon supplied material to the principal counsel for the appellants, but was not informed as to the extent of its use prior to receiving his brief this week.

Respectfully submitted,

WM. DWIGHT WHITNEY,
Counsel.

April 17, 1950.

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In the Supreme Court of the United States

OCTOBER TERM, 1949

No. 490

UNITED STATES OF AMERICA, APPELLANT

v.

COTTON VALLEY OPERATORS COMMITTEE ET AL.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF LOUISIANA

PETITION FOR REHEARING

The United States of America, by the Solicitor General, respectfully prays for a rehearing of this case or for other appropriate relief if rehearing be not granted.

The appeal in this case presented three issues: (1) whether there had been a showing of "good cause" for the district court's order to produce, as required by Rule 34; (2) whether the documents ordered produced involved the "work product" of a lawyer and were thus not within the limits of per-

missible discovery; and (3) whether they were "privileged" and thereby excepted from Rule 34.

The above questions, left undetermined by this Court's *per curiam* order of affirmance, are of considerable importance in the trial of civil actions in the federal courts. Increasing use is being made of the discovery provisions of the Federal Rules of Civil Procedure, and the uncertainty as to whether there was an even division of this Court on each or on any one of the issues presented in this case will further promote diversity in the rulings of federal district courts.

We submit that in these circumstances a rehearing is clearly in the public interest if there is any possibility that it might lead to a majority decision.[1] The Government particularly calls attention to the issue raised both here and in the district court as to the adequacy of the showing of good cause for the production ordered by the district court. It was the Government's position, in brief and in oral argument, that this is the threshold question in the case. We now wish to reaffirm that stand since certain questions asked Government counsel at argument indicate that our position may have been misunderstood.

The district court dismissed the action for fail-

[1] Under paragraph 1 of Rule 33 of the Rules of this Court, the grounds of a petition for rehearing are not confined, as they are under paragraph 2 of that Rule dealing with rehearing of orders on petitions for writs of certiorari, to "intervening circumstances of substantial or controlling effect" or to "other substantial grounds available to petitioner although not previously presented."

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ure to comply with its order to produce certain documents, and the sole basis for its order to produce was The Ohio Oil Company's motion under Rule 34. That Rule authorizes an order to produce upon motion of any party "showing good cause therefor." Such a showing is essential to a valid order to produce, and the district court's judgment of dismissal cannot stand unless a valid order to produce has been violated.

The Ohio Oil Company's motion constituted a blanket demand for all documents falling within certain broad categories. There was no specification of the defendant's need for such documents other than a statement so generalized that, if it will suffice, the good cause showing required by the Rule is nothing more than verbal formalism. If the good cause requirement is satisfied by a conclusory allegation, such as made here, that the documents sought may aid counsel in preparing the cause for trial, it is merely a *pro forma* requirement.

The very breadth of the subject matter of discovery under Rule 34 demands adherence to the requirement that the moving party particularize his need for discovery of the documents which he seeks. The Rule, as its scope is defined by reference to Rule 26(b), embraces whatever "appears reasonably calculated to lead to the discovery of admissible evidence." If a party need show, by way of good cause for production, no more than

conjecture that his preparation for trial will be facilitated by discovery of all the documents relating to the case in the possession of an opposing party, the Rule becomes an instrument for a dragnet exploration never heretofore sanctioned by law. Although there would thus seem to be grave doubts as to the adequacy of the showing of good cause made in this case, any failure in this respect is now overlooked or condoned if this Court's *per curiam* affirmance of the judgment of dismissal stands. The effect of such affirmance is that, notwithstanding such doubts, the Government is barred from bringing to trial a serious charge of violation of the antitrust laws.

The district court made no statement of its reasons for denying the Government's contention that good cause had not been shown. In the circumstances, this Court might conclude that on the present record it is not clear whether the issue which is before it as to showing of good cause presents the question of an abuse of discretion by the district court in ruling thereon or the question of misinterpretation of Rule 34 by construing it as satisfied by a purely perfunctory allegation.

The Government's reply brief in this Court made it clear that there is no basis for the appellees' contention that the Government did not make any objection in the district court founded upon inadequacy in the showing of good cause. And there

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is nothing in the record to indicate that, because attention was focused upon some other issue in the later stages of the proceedings below, the Government, as the appellees now contend, abandoned it. The district court did not make any such finding, and the point never was abandoned.

We therefore pray that this Court, if it is unwilling to grant rehearing, set aside the judgment of dismissal and remand the cause to the district court with directions to rule upon the showing of good cause in the light of all pertinent factors, including any further showing thereon which the moving party may choose to make.

Respectfully submitted,

PHILIP B. PERLMAN,
Solicitor General.

CERTIFICATE OF COUNSEL

I hereby certify that this petition for rehearing is presented in good faith and not for delay.

———— ————,

PHILIP B. PERLMAN,
Solicitor General.

MAY, 1950.

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APRIL 24, 1950.

Per Curiam Decisions.

No. 490. UNITED STATES *v.* COTTON VALLEY OPERATORS COMMITTEE ET AL. Appeal from the United States District Court for the Western District of Louisiana. Argued April 18, 1950. Decided April 24, 1950. *Per Curiam:* The judgment is affirmed by an equally divided Court. MR. JUSTICE CLARK took no part in the consideration or decision of this case. *Assistant Attorney General Bergson* argued the cause for the United States. With him on the brief were *Solicitor General Perlman, Charles H. Weston, Stanley M. Silverberg* and *Richard E. Guggenheim. Arthur O'Quin* argued the cause for the Ohio Oil Co. et al., appellees. With him on the brief were *Charles D. Egan, David E. Smitherman, John M. Madison, W. Scott Wilkinson, H. F. Aby, Leslie Moses, A. M. Gee, C. F. Currier* and *Leon O'Quin. Charles L. Black* argued the cause for the Stanolind Oil & Gas Co. et al., appellees. With him on the brief were *Donald Campbell, W. W. Heard* and *Dan Moody. Chas. B. Wallace, Walace Hawkins* and *Earl A. Brown* submitted on brief for the Magnolia Petroleum Co., appellee.

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